88-1989

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RONALD CALDEIRA, Petitioner

v.

COUNTY OF KAUAI;
HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,

AFSCME LOCAL 152, AFL-CIO, et al., Respondents

ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

APPENDICES

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Issues Presented

1. Whether the order of a state judge, which is transformed into a judgment by state statute, confirming an arbitration award which sustained petitioner's discharge from public employment, is preclusive under the Full Faith and Credit Statute, 28 U.S.C. §1738, of Petitioner's §1983 action in federal court against respondent County and its officials when:

(a) The order was obtained on summary proceedings;

(b) the state judge had no power to review the arbitration award for legal error or for factual error under either the clearly erroneous or substantial evidence standard, or even for

arbitrariness, but was mandated by state statute to confirm the award upon its filing in court together with a copy of the collective bargaining agreement?

(c) the state judge lacked jurisdiction to adjudicate a §1983 claim and had no power give petitiioner compensatory damages, punitive damages, damages for emotional distress, or attorney's fees, which were available to himi under §1983;

2. Whether the confirmation hearing before the state judge was full and fair, and whether there were reasons to question the quality, extensiveness, or fairness of such hearing, when the motion to confirm was filed a year-and-a-half after the time

permitted by state statute and:

(a) Petitioner did not have adequate notice of the hearing setting forth the grounds for late and untimely filing of such motion;

(b) Petitioner was denied a continuance of the hearing to meet such grounds as stated for the first time in oral argument at the hearing;

(c) Petitioner could not engage in discovery;

(d) Petitioner had no opportunity for hearing in that

(1) Petitioner could not put on the proof on which he relied in his §1983 action;

(2) Petitioner could not cross-examine witnesses;

(e) the state court lacked subject matter jurisdiction and power to grant §1983 relief;

(f) there was reason to question the impartiality of the state judge, who made arbitrary and capricious decisions in failing to grant pettioner a continuance and in failing to recognize that the motion to confirm was untimely;

(g) the state judge made no findings of fact or conclusions of law and did not articulate the reasons for his decision in any manner;

(h) there was no right of appeal from the order of confirmation.

3. Whether petitioner's claim in arbitration, and claim before the state judge on confirmation hearing were the

"same claim" raising the "same issue" as Petitioner's §1983 action, so as to be entitled to claim and issue preclusive effect when

(a) Petitioner relied on different evidence--namely, a conspiracy among and between respondent County and Union officials--which was not presented to the Arbitrator and could not be entertained by the state judge;

(b) Neither the arbitrator nor the state judge had jurisdiction to decide a §1983 claim or power to grant §1983 relief; and petitioner was unable to raise §1983 issues either with the arbitrator or the state judge;

(c) Neither had expertise in the

constitutional law pertaining to §1983;

(d) the Union and County officials were sued, in the §1983 action, in both their representative and individual capacites, whereas the arbitration and confirmation hearing involved only the County and Union as entities;

(d) Petitioner's §1983 claim depends on a federal source of right.

4. Whether the state confirmation order was "on the merits" when the state court judge could not review the arbitration award even for arbitrariness but was mandated by statute to confirm the award upon its presentation together with the collective bargaining agreement.

5. Whether the Ninth Circuit

failed to correctly determine and apply Hawaii preclusion law which exempts a plaintiff from the res judicata effects of a judgment if at the time of the first suit he is ignorant of the rights which he later asserts in the second suit.

6. Whether Caldeira's §1983 claim is covered by federal common law or other exceptions to preclusion applicable to protect federal interests or when a defendant's conduct should estop him from relying on preclusion.

7. Whether, notwithstanding any failure of Petitioner's §1985(3) conspiracy claim against the Union and its officials for lack of class based animus, the Ninth Circuit failed to hold that they have liability both under state of joint liability and directly under §1983.

8. Whether the decision of the Hawaii Labor Relations Board, formerly the Hawaii Public Employee Relations Board, that certain of Petitioner's unfair labor practices were time-barred but that in any event the aforesaid state court confirmation order was preclusive, can be said to be "on the merits" for purposes of determining its res judicata effect.

List of Defendants

1. COUNTY OF KAUAI

2. EDUARDO E. MALAPIT, individually

3. EDUARDO E. MALAPIT, in his representative capacity as former Mayor of the County of Kauai

4. TONY T. KUNIMURA, individually

5. TONY T. KUNIMURA, in his representative capacity as Mayor of the County of Kauai

6. HENRY MORITA, individually

7. HENRY MORITA, in his representative capacity as former County Engineer, Department of Public Works, County of Kauai

8. LAWRENCE KITAMURA, individually

9. LAWRENCE KITAMURA, in his representative capacity as County Engineer, Department of Public Works, County of Kauai

10. GORDON H. SHIBAO, individually

11. GORDON H. SHIBAO, in his representative capacity as Superintendent of Parks and Recreation, Department of Public Works, County of Kauai

12. WILSON MIYASHIRO, individually

13. WILSON MIYASHIRO, in his representative capacity as Director of Recreation, Department of Public

Works, County of Kauai

14. ISAAC HOOKANO, individually

15. ISAAC HOOKANO, in his representative capacity as former Supervising Lifeguard, Parks and Recreation, Department of Public Works, County of Kauai

16. PHILLIP KEKAHU, individually

17. PHILLIP KEKAHU, in his representative capacity as lifeguard, Parks and Recreation, Department of Public Works, County of Kauai

18. SID KINI, individually

19. SID KINI, in his representative capacity as lifeguard, Parks and Recreation, Department of Public Works, County of Kauai

20. HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, a labor union

21. CLARENCE M. ("GADGET") TAKASHIMA, individually

22. CLARENCE M. ("GADGET") TAKASHIMA, in his former representative capacity as Kauai Division Chief of HGEA

23. JESSIE K. MANLAPIT, individually

24. JESSIE K. MANLAPIT, in his representative capacity as former Kauai Division Chief of HGEA

25. RAY S. EMURA, individually

26. RAY S. EMURA, in his representative capacity as Acting Kauai Division Chief and Kauai Division Chief of HGEA

27. RUSSELL OKATA, individually

28. RUSSELL OKATA, in his representative capacity as former Executive Director of HGEA

29. JOHN E. K. AKANA, individually

30. JOHN E. K. AKANA, in his representative capacity as Deputy Executive Director of HGEA

31. DAVIS K. YOGI, individually

32. DAVIS K. YOGI, in his representative capacity as Contracts Specialist, HGEA

33. CHARLES KUNITAKE, individually

34. CHARLES KUNITAKE, in his representative capacity as Contracts Officer of HGEA

35. MELVIN HIGA, individually

36. MELVIN HIGA, in his representative capacity as Executive Assistant of HGEA

37. DOES 1 to 20, inclusive.

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Opinions Below

The opinions of the District Court for the District of Hawaii are unreported but are attached as Appendices F and H. The opinion of the Court of Appeals for the Ninth Circuit is reported at 866 F. 2d 1175 (9th Cir. 1989, Docket No. 87-2959). It is also contained in Appendix B.

Jurisdiction

The Ninth Circuit judgment was rendered, filed and entered on February 2, 1989. No petition for rehearing was filed. On April 24, 1989, this Court granted petitioner to and including June 2, 1989, in which to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved
[quoted in Appendix A]

U.S. CONST., ART. IV, § 1; 28 U.S.C. §1738; CIVIL RIGHTS ACT, 42 U.S.C. §§1983 and 1985(3); HAW. REV. STAT., Chapter 658, §§658-6, 7, 8, 9, 10, 11, 12, 13,14, and 15.

Statement of the Case

A. SUBSTANTIVE FACTS.

Petitioner Ronald Caldeira ("Caldeira") was hired in 1978 by Respondent County of Kauai ("the County") in its Department of Public Works as a life-

guard at the County's Kapaa pool on the Island of Kauai. Caldeira held this job and job classification for some five years, until October 11, 1983, when he was discharged [CR 69 p.101].[1/]

Commencing in the first year of Caldeira's employment, there developed between respondent County officials a conspiracy to effect Caldeira's discharge by the County when no good cause existed for discharge[2/]. Pursuant to this conspiracy, as Caldeira later alleged in his Civil Rights Act complaint, respondent County officials refused to furnish Caldeira tools, materials, and supplies which he needed to maintain the Kapaa Pool; disciplined him for its resultant poor condition; and thereby built up the appearance of progressively severe disciplinary sanctions based on false charges so as to make out a case of good cause for discharge [complaint ¶ 7].

Caldeira further alleged in his complaint that soon after inception of the conspiracy, respondent officials of respondent Hawaii Government Employees Association ("the Union") knowingly joined in it by refusing to investigate disciplinary penalties imposed on Caldeira, refusing to investigate his grievances, and refusing to process such grievances [complaint ¶ 24]. There were 12 distinct phases or episodes of the conspiracy [see n.2 supra].

EPISODE 1 (November 1978-October 1979) [APP. M pp. 3-10]: Caldeira's supervisor, respondent Isaac Hookano ("Hookano") signed a letter to Caldeira forging the names of other lifeguards, criticizing Caldeira's work, and insulting his genitals; and Hookano and his supervisor, respondent Wilson Miyashiro ("Miyashiro"), Director of Recreation for the County's Public Works Department, began a series of written reprimands to Caldeira for the pool's poor condition and maintenance while at the same time failing to keep Caldeira stocked with the supplies and equipment needed to do so.

EPISODE 2 (January-May 1980) [APP. M pp. 10-11]: Miyashiro and his supervisor, respondent Gordon H. Shibao ("Shibao"),

Superintendent of Parks and Recreation for the County's Public Works Department, tried to get Caldeira discharged by having the Red Cross test his life saving skills, hoping he would fail the test. The scheme backfired when Caldeira passed the test.

EPISODE 3 (June 1980) [APP. M pp. 1114]: Hookano, Miyashiro, and Shibao got respondent Henry Morita ("Morita"), then County Engineer (head of the Department of Public Works), to suspend Caldeira for two days because he had not turned in his time sheets on the day marking the end of the pay period, although he had three days thereafter to do so The Union knew but did not grieve.

EPISODE 4 (June-July 1980) [APP. M pp. 14-19]: Hookano, Miyashiro, and Shibao recommended to Morita that he suspend Caldeira for 5 days for leaving work without authorization when Caldeira, complying with a change in his work schedule, left work an hour earlier than usual but did not sign a change form. When Caldeira asked his Union representative, respondent Clarence ("Gadget") Takashima ("Takashima"), to grieve, Takashima laughed and told Caldeira: "I am going to sit back and laugh when you get fired."

EPISODE 5 (January 1989) [APP. M p. 20]: the County gave Caldeira an unsatisfactory annual Job Performance Rating ("JPR"); and Miyashiro recommended a five-day suspension which the Union refused to grieve.

EPISODE 6 (May-September 1981) [APP. M pp. 21-33]: Miyashiro accused Caldeira of "sabotaging" the pool at a time when

Ronald was on a month's sick leave; and Morita imposed a 10 day suspension, threatening dismissal. The Union grieved only after Caldeira filed an internal Union appeal; agreed with respondent Mayor Eduardo Malapit ("Malapit") to a 5 day suspension, deferred for one year as long as Caldeira maintained a "satisfactory" JPR; and then refused to arbitrate, Takashima, telling County officials privately that Ronald had "no gri vance," was "on his own," and should be denied further hearings.

EPISODE 7 (October-November 1981) [APP M pp. 34-37]: Miyashiro accused Ronald of "incompetence" for causing particles in the pool requiring repair of the filtration system. Ronald's grievance over these charges [410] was "resolved whereby no such accusation [of incompetence] was made" [429]; but no County retraction ever issued.

EPISODE 8 (November-December 1981) [APP. M pp. 37-45]: Takashima refused to investigate and would not grieve or arbitrate when Morita suspended Caldeira for 20 days for allegedly failing to notice that a four-year-boy had "almost drowned" at the pool. Caldeira filed an unfair labor practice complaint with the Hawaii Public Relations Board ("HPERB"), which after full evidentiary hearing issued a published decision, Caldeira v. Malapit, et al., Case Nos. CE-03-80 and CU-03-45, decision no. 196, 3 HPERB 523 (1984) [CR 70, Ex. A], ruling both that the Union had abandoned Caldeira and that the County had improperly refused his grievance.

EPISODE 9 (July 1982) [APP. M pp. 46-48]: the County gave Caldeira a "not quite satisfactory" JPR; and Morita imposed the deferred 5 day suspension.

Following a Step 1 meeting, respondent Union agent Ray Emura ("Emura") told Caldeira that the Union would not grieve further and would accept the suspension.

EPISODE 10 (March 1983) [APP. M pp. 48-54]: a new lifeguard assigned to Kapaa Pool, respondent Philip Kekahu ("Kekahu"), was given the manual for new pumps being installed in the pool, whereas Caldeira was not. Caldeira grieved to respondent Jesse Manlapit ("Manlapit"),[3/] the Union's new Kauai division chief (Takashima having retired). After some vacillating, Manlapit told the County that he was "dropping this grievance".

EPISODE 11 (September-October 1983) [APP. M pp. 54-58]: Miyashiro suspended Caldeira for 3 days for failing to carry out orders to perform the menial work of cleaning the pool's toilets, bathrooms, and shower stalls and pulling weeds. Emura refused to grieve this demotion of Caldeira to yardman. Then new County Engineer, respondent Lawrence Kitamura ("Kitamura"), at the urging of Miyashiro and Shibao, discharged Caldeira for failing to carry out these orders as well as for failing to carry out Kitamura's personal order to cut the lawn around the pool with a "cut cane knife" (a machete-like knife (the County would not furnish Caldeira with a lawnmower) with which Caldeira then cut himself, trying to comply. Emura had also refused to grieve this order; but after Caldeira's internal Union appeal the Union did take the 3-day suspension and discharge to arbitration.

EPISODE 12 (January 1985) [APP. M pp. 58-65]: in arbitration before arbitrator Stanley Ling, Esq. [see Arbitration Trans-

cript (CR 67 (Ex. A)], the Union's attorney, Charles Khim, in exclusive control of the arbitration on Caldeira's behalf, refused Caldeira's request to use some of the conspiracy evidence (Caldeira later filed his second complaint with HPERB over this refusal [CR 60 Ex. B]), never made any argument that because of the conspiracy, Caldeira was entitled to resist his demotion and the "cut-cane knife" order, put on no evidence of Episodes 1 through 10, did not mention the Civil Rights Act, and limited the defense of Caldeira to showing only that he had tried, despite his injury, to perform the various orders. With only Episode 11 before him, Arbitrator Ling issued a written decision on January 15, 1985, sustaining the discharge [APP C].

Thereafter Caldeira, on April 8, 1985, filed his second unfair labor practice complaint with HPERB [CR 60 (Ex. B)]. A few months later, on July 16, 1985, Caldeira also filed his Civil Rights Act complaint in the District Court for the District of Hawaii, which had federal question jurisdiction under 28 U.S.C. § 1331. Caldeira sought damages under 42 U.S.C. §1983 [APP. A p. ii; Complaint ¶10], which protected him, as a tenured civil servant with both a property and liberty interest

in his job, from state action which had taken away his job, and thereby deprived him of his constitutional rights [Complaint ¶¶ 10, 11, 12, and 13]. The Union and its officials were joined as co-conspirators under 42 U.S.C. §1985(3) [APP.A p. v; Complaint ¶¶ 21, 26].

B. PROCEDURAL FACTS.

Two years later, with jury trial set to commence in October 1897 before the Honorable Harold W. Fong, United States District Judge, the Union moved for summary judgment (the County joined in the motion) [CR 58, 60] on the ground inter alia that the arbitration award was res judicata, precluding Caldeira's federal Civil Rights action [CR 58 (Memorandum, p. 5].

Caldeira's opposition memorandum noted that the County had not moved in state court for judicial confirmation of the ar-

bitration award as provided in HAW. REV.

STAT. §658-8 [APP. B p. xiv-xv] and argued that under McDonald v. City of West Branch, 466 U.S. 284 (1984) the award was not preclusive [CT 65, pp. 9-10].

The Union and the County then took themselves to state court on Kauai (Hawaii's Fifth Circuit Court); and on September 15, 1987, the County filed a motion for confirmation of the arbitration award [CR 76 (Ex. A)] under HAW. REV. STAT. §658-8. The Union joined with the County in this motion, APP. D (Transcript of Hearing) p.7;

The County's motion was a year and one half too late, as HAW. REV. STAT. §658-8 required that a motion for confirmation be brought "...within one year after the award is made...." Caldeira therefore opposed confirmation on the ground that the motion was time-barred [CR 77 (Ex. A], stating to Hawaii Fifth Circuit Judge Kei Hirano that such

untimely action by the County should not "serve to derail Caldeira's civil rights trial two weeks from now." [Id., p. 8].

During oral argument lasting approximately 20 minutes [APP D], both the County and the Union argued to Judge Hirano, for the first time, that the one year statute of limitations was tolled by the pendency of Caldeira's administrative claim before HPERB [CR 77 (Ex. B, pp.4-8)], citing purported case law [APP. D pp.6, 7-8]. Caldeira, surprised by this claim, requested time to brief the cases cited by the County and the Union [Id., p. 9]. Judge Hirano did not grant Caldeira's request, agreed with the County that the one-year period had been tolled, and granted the motion to cinfirm [Id., p. 10]. On September 25, 1987, the same day as oral argument, a formal written order confirming the arbitration award was entered. [APP. E][4/]

In federal court the following Monday, on September 28, 1987, for hearing on the Union's summary judgment motion, the Union and the County filed a copy of Judge Hirano's September 25 order of confirmation. Judge Fong took the motion under advisement [Tr. p. 58].

On October 5, 1987, with the federal motion still under advisement, Caldeira moved Judge Hirano in state court for reconsideration [CR 80 (Ex. A)], briefing the tolling issue.[5/]. At the same time as Caldeira moved for reconsideration, he also filed a motion to vacate the arbitration award, placing before Judge Hirano the same evidentiary record as in federal court [CR 80, Ex. A (Aff. of Robert A. Smith, ¶¶ 2, 3].

On October 9, 1987, four days later, Judge Fong in federal court rendered his decision granting the Union's and County's motion for summary judgment

[APP. F][6/].

On October 14, 1987, Caldeira filed a supplemental memorandum with Judge Hirano, attaching a copy of Judge Fong's decision [CR 80 (Ex. D)]. Caldeira further informed Judge Hirano that the HPERB proceeding had been dormant for over two years without any hearings on the merits [Id., Ex. D (Aff. of Robert A. Smith, ¶ 2)]. Notwithstanding these arguments, Judge Hirano on October 15, 1987, after a telephone conference hearing of approximately 25 minutes [APP G (transcript of hearing)] denied Caldeira's motion for reconsideration and the motion to vaate, stating: "...when looking at all of the submittals, your motion is going to be denied [APP. G p. 21]. Judge Hirano gave no further articulation for his decision, either at the time or later, in formal written order of denial [APP. H].

Caldeira did not appeal Judge Hirano's confirmation order because under the parties' collective bargaining agreement[7/] as enforced by HAW. REV. STAT. §658-15,[8/] that order was not appealable. Caldeira therefore turned his attention to Judge Fong's decision in federal court. After judgment was entered thereon dismissing Caldeira's action on October 13, 1987 [APP. I]72]. Caldeira moved for reconsideration [CR 80]. Judge Fong denied the motion on October 26, 1987 [APP J]; and Caldeira timely appealed to the Ninth Circuit on November 6, 1987 [CR 84; ER 81]. The Ninth Circuit had jurisdiction under 28 U.S.C. § 1294.

Having timely appealed Judge Fong's decision, Caldeira then, on December 26, 1987, filed a Petition for Writ of Mandamus in the Hawaii Supreme Court, [ER 83-108]. On January 5, 1988, Caldeira's

petition for writ was dismissed [ER 109]. Meanwhile, the County, on December 16, 1987, had filed an argument with HPERB contending that Caldeira was "mistaken" in his belief that Judge Hirano's order was not appealable and should have taken the appeal [ER 115], Caldeira then filed an untimely (by 9 days) appeal [ER 110], arguing that the County, by virtue of its argument, was estopped to deny appealability and challenge timeliness. The Hawaii Supreme Court dismissed the appeal as untimely on March 24, 1988 [ER 112].

Seventeen days before oral argument on Caldeira's appeal to the Ninth Circuit, HPERB, on November 1, 1988, decided Caldeira's second unfair labor practice complaint [APP. K], ruling that episodes 1-10 were timed-barred [Id., p.20] but that in any event, HPERB was precluded by Judge Fong's and Judge

Hirano's decisions from considering any of the 12 episodes [Id., p. 37-38]

The Ninth Circuit, after oral argument, was advised of this decision and sent a copy by joint letter from all counsel in the case [APP L]. Thereafter, on February 2, 1989, the Ninth Circuit rendered its decision herein.

Argument

A. BACKGROUND.

As both a Hawaii state court and a Hawaii state administrative agency have ruled on certain aspects of Caldeira's claims against the Union and the County arising out of his discharge, the case requires consideration of this Court's numerous preclusion decisions.[9/] Although no one decision has purported to limit or overrule any other, it may be noted that they are frequently inconsisent, even to the point of proceeding from "...two diametrically

inconsistent visions of the legislative history of section 1983."[10/]

In one such vision, §1983 was enacted precisely because state officials and courts could not be trusted to enforce federal interests, Haring v. Prosise, 462 U.S. 306, 323 (1983); Allen v. McCurry, 449 U.S. 90, 98-99 (1980); and the federal courts were therefore to "interpose" themselves as "guarantors" of the constitutional rights of the people, McDonald, 466 U.S. at 290, quoting from Mitchum v. Foster, 407 U.S. 225, 242 (1972), citing inter alia Monroe v. Pape, 365 U.S. 167 (1961).

In the other vision, the Court notes that "[m]uch has changed" since the Reconstruction Era Civil Rights Acts were passed, Pulliam v. Allen, 466 U.S. 522, 541 (1984), and exalts the interests of "comity" and "Our Federalism," expressing confidence in the ability of the state

courts to protect federal as well as local interests.[11]/

Under this Court's decision in Kremer v. Chemical Construction Corp., 456 U.S. 461, 474 (1982), it is settled that a litigant may have "...one full opportunity for a hearing on any issue, but because of limited resources, only one opportunity."[12]/ Yet this Court has also decided in McDonald and Gardner-Denver that in both Title VII and §1983 cases, "...an arbitration proceeding cannot provide an adequate substitute for a judicial trial [emphasis added]."[13]/

The precise holding of Kremer was that the Full Faith and Credit Statute, 28 U.S.C. § 1738 [APP A p. i] requires federal courts in section 1983 and Title VII lawsuits to give issue[14]/ preclusive effect to state court "final judgments on the merits."[15]/ In Migra v. Warren City School District Board. of Education, 465 U.S. 74 (1984),this Court

adopted claim preclusion as well [465 U.S. at 83]. In University of Tennesee v. Elliot, 478 U.S. 788, ___, 106 S.Ct. 3220, 3225 (1986), this Court extended rules of issue and claim preclusion to the decisions of state administrative agencies, to which §1738 has no application, in §1983 cases (although not in Title VII cases).

In these decisions, this Court has made a clear policy choice. As set forth in Migra, 465 U.S. at 84:

> ...it is more important to give full faith and credit to state court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources.

There are, however, major, qualifying limitations on preclusion. For in Kremer this Court also held that state proceedings, whether judicial or administrative, are neither claim nor issue preclusive

> ...when the party against whom the earlier decision is asserted did not have a "full and fair opportunity" to litigate the claim or issue, Allen v. McCurry, 449 US at 95, 66 L Ed 2d 308, 101 S Ct 411; Montana v. United States, 440 US 145, 153, 59 L Ed 2d 210, 99 S Ct 970 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 US 313,328-329, 28 L Ed 2d 788, 91 S Ct 1434 (1971). Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation. Montana v. United States, supra, at 164, n. 1, 59 L Ed 2d 219, 99 S Ct 970. Cf. Gibson v. Berryhill, 411 US 564, 32 L Ed 2d 488, 93 S Ct 1689 (1973). Kremer, 456 U.S. at 480-481 [Emphasis added][16] Compare United States v. Utah Mining and Construction Co., 384 U.S. 394, 421-422 [administrative res judicata requires "adequate opportunity to litigate"].

This Court in Kremer went on to equate "full and fair opportunity to litigate" with "...minimum procedural...Due Process...." [id., at 481]. But "full and fair" has not been further "defined";[16] and the present case provides opportunity for the Court to resolve many unanswered questions concerning the reach and scope

of preclusion in §1983 litigation.

B. CALDEIRA'S §1983 CLAIM AGAINST THE COUNTY AND ITS OFFICIALS WAS NOT PRECLUDED.

1. Caldeira Never Received "Full and Fair" Hearings; and Their "Quality, Extensiveness, and Fairness" May Be Doubted.

a. Administrative Res Judicata: The Arbitration.

Almost by definition, the arbitration hearing was not full, fair, or adequate because this Court has decided that arbitration is not an "adequate substitute" for a trial of either §1983 or Title VI claims. McDonald; Gardner-Denver; see supra p. 18. Caldeira could not put on evidence of the conspiracy because the Union--his adversary--controlled the proof. This was one of the very conflicts in arbitration about which Justice Brennan specifically warned about in McDonald [466 U.S. at 291]. Further, the arbitrator had no authority or jurisdic-

tion to consider section 1983 or award punitive damages, damages for emotional distres, or attorney's fees.

So it seems incontestable that, standing by itself, the arbitration hearing was not full or fair. The question, however, is whether this result is changed by state circuit Judge Hirano's confirmation order.

b. The "Hearings" In State Court.

Any determination of procedural fairness[17/] requires consideration of whether there was:

(1) notice;
(2) discovery;
(3) opportunity to be heard;
(4) an impartial judge;
(5) an opportunity to present evidence;
(6) an opportunity to cross-examine;
(7) a decision based on and supported by the evidence;
(8) jurisdiction to grant relief; and
(9) appellate review.

Certain of these factors are essential to procedural due process.[18/] If numerous of these factors are lacking, at the very

least the "quality, extensiveness, or fairness" of the proceeding may be called into question.

(1) Notice.

The County gave notice of its untimely motion to confirm the arbitration award. But notice must not only be given; it must be adequate--it must set forth the grounds on which relief is sought.[19/] Yet the County's motion gave no hint of the tolling doctrine on which the County relied at the hearing. When the notice given does not specify the grounds, a litigant is entitled to a continuance of hearing in order to prepare.[20/] Yet when Caldeira's counsel, surprised at the hearing by the County's tolling argument,asked for a continuance in order to brief the cases cited by the County in oral argument, Judge Hirano denied Caldeira's request. In these circumstan-

ces, Caldeira did not have adequate notice.

(2) Discovery.

This Court has intimated that lack of discovery may deprive the first judgment of "offensive collateral estoppel" effect for want of "full and fair" opportunity to litigate.[21] Before Judge Hirano, there could be no discovery, as the hearing was on motion and summary.[22]

(3) Opportunity for Hearing.

A number of decisions hold that where the "hearing" is summary, or preliminary, or suffers other limitations on scope, it may violate due process.[23] In this case the hearing before Judge Hirano was summary, as just indicated. It was also sharply circumscribed by Hawaii statute which placed limitations on what Judge Hirano could do. Pursuant to HAW. REV. STAT. §653-13 [APP. A p. xx], the "record" to be filed by the County with

its summary motion to confirm consisted only of

> "(1) The [collective bargaining] agreement...; and
> "(2) The award."

Following the filing of the motion and "record" (as thus defined), HAW. REV. STAT. § 658-8 then commanded that the judge

> [t]hereupon...shall grant such an order [of confirmation], unless the award is vacated, modified, or corrected, as prescribed in §§ 658-9 and 658-10. [Emphasis added].

At the time that the County's motion to confirm was filed, no vacation, modification, or correction was possible under these further Hawaii provisions.[24]. Thus Judge Hirano's hands were completely tied: unless he denied the motion as untimely, he was compelled by statute to grant it. In these circumstances, there was no opportunity for Caldeira to be heard, let alone have a "full" opportunity to

litigate.

(4) An Impartial Judge.

The requirement of an impartial judge is an essential element of procedural due process [see n. 18 supra]. Reasons exist to question Judge Hirano's impartiality, on which the Ninth Circuit made no comment whatsoever in its decision.[25/]

(5) Opportunity To Present Evidence.

Part and parcel of "opportunity for hearing," and essential to due process, is the opportunity to present evidence [see n. 18 supra]. Caldeira, after Judge Hirano confirmed the arbitration award, tried, on motion for reconsideration and to vacate, to present evidence. But reconsideration was limited to the tolling issue.[26/] All other issues (and supporting evidence) were time-barred because the Union had not

filed a motion to vacate within 10 days. Thus Judge Hirano could not consider the conspiracy evidence had he wanted to do so.

Caldeira also believes that, to a scrutinizing eye reviewing the transcript of the second hearing before Judge Hirano on reconsideration [APP. G], it is clear that Judge Hirano did not consider the conspiracy evidence. There is thus "reason to doubt" the "quality, extensiveness, and fairness" of the "hearings" before Judge Hirano, which totalled all of 45 minutes.

(6) Cross-Examination.

Likewise an essential element of due process is the opportunity to cross-examine witnesses [see n. 18 supra]. Caldeira had no such right before Judge Hirano as the confirmation hearing was summary.

(7) The Right To A Decision Based

On And Supported By The Evidence.

Minimal due process requires "...a decision based solely on the evidence...."[27/] Findings of fact and conclusions of law require a judge to hew to the evidence and the law and provide a basis for appellate review. Findings are especially apt in administrative proceedings.[28/] Yet Judge Hirano made no findings or conclusions. There was simply an order granting confirmation [APP. E] and an order denying the motions for reconsideration and to vacate [APP. H].

(8) Jurisdiction.

All authorities agree that Jurisdiction in the first proceeding to hear and determine the claim or cause being precluded in the second is essential to procedural due process.[29/] Over the years, the

decisions of this Court have consistently so held.

In 1965, this Court in Utah denied preclusive effect to a decision of the Board of Contract Appeals, observing that the Board "...had no jurisdiction to award monetary relief." [384 U.S. at 403]. In 1974 in Gardner-Denver, this Court noted that an arbitrator "...has no general authority to invoke public laws...." [415 U.S. at 53].

In 1980 in Thomas v. Washington Gas Light Co., 448 U.S. 261, this Court, in the plurality opinion of Justice Stevens, adopted the views expressed by Restatement §26(1)(c) [see n. 29 supra] in a slightly different context.[30/] In 1981 this Court in Barrentine v. Arkansas-Best Freight Systems, Inc. 450 U.S. 728 held that truck drivers who had lost their compensation claims in arbitration were not precluded from suing

in federal court under the Fair Labor Standards Act because their FLSA claims arose, not from the collective bargaining agreement, but "...out of a statute designed to provide minimum substantive guarantees to individual workers." Id., at 737.

Even more recently, in 1985, this Court, in Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 382-383, held that a state court dismissal for failure to state a cause of action under state law did not bar a later antitrust suit in federal court because the state court had no Sherman Act jurisdiction. This Court's decision was based on an application of state preclusion law which embraced the Restatement §26(c)(1) jurisdictional exception.

Accordingly, it seems well established that lack of jurisdiction--

including lack of power to order particular relief or grant a particular remedy--will defeat preclusion. A number of post-Kremer lower court decisions, including a number of Ninth Circuit decisions, so hold.[31/]

Neither the arbitrator nor Judge Hirano in state court had jurisdiction or power to adjudicate a section 1983 action, award punitive damages, award damages for emotional distress, or award attorney's fees. Therefore their decisions were not preclusive.

(9) Appellate Review.

Although appellate review is not essential to procedural due process,[32/] its absence may, together with other procedural deficiencies, violate due process.[33/]

In the present case, the Ninth Circuit stated that Caldeira was under the "mistaken belief" that he could not

appeal Judge Hirano's confirmation order [Caldeira, supra, 866 F. 2d 1175 at ___; APP B p. 699 n. 4]. But the Ninth Circuit did not explain why it disagreed with Caldeira's analysis of his appeal rights. Caldeira believes that Judge Hirano's order was not appealable and that the absence of appellate review is a factor to be considered in weighing whether the proceeding before Judge Hirano comported with procedural due process.

(10) "Full and Fair"--Fact Questions

In assessing the "fullness and fairness" of the proceedings both before the arbitrator and Judge Hirano, and in asking whether there is "reason" to question the "quality, extensiveness, or fairness" thereof, factual questions abound.[34/] The answers to these questions would determine whether the hearings which Judge Hirano gave Caldeira

were "full and fair." That they are factual questions suggests that discovery on such questions--litigation on such questions--is necessary in order to determine fullness and fairness, which in turn necessitates remand.[35]

2. There Was No Preclusion Because Caldeira's Section 1983 Claim Did Not Involve The "Same Issue" And Was A "Different Claim."

Res judicata bars a second suit on the "same" claim or cause of action[36] but not on a "different" claim of cause of action;[37] and issue preclusion bars a second suit on the "same issue" provided it was actually determined in the first suit.[38] To be "actually determined," it must be pleaded, denied, litigated, and ruled on by findings and must further be necessary to the decision.[39]

It is true that "claim" in modern parlance is broadly viewed to require

that a plaintiff present in one suit "...all the claims for relief that he may have arising out of the same transaction or occurrence,"[40] or thereafter be barred. Nonetheless the federal courts continue to treat Title VII and §1983 actions as "different," justifying denial of §1983 preclusion, although there are decisions *contra*. One such difference is want of subject matter jurisdiction in state proceedings, already discussed *supra*. Another difference is lack of remedy.[41] Still another is the inability to raise or litigate a given issue in the state proceeding.[42] Issues are characterized as "different" even though they stem from the same transaction or occurrence.[43] Or a difference in the evidence justifies denial of preclusion, particularly where the different evidence from one tribunal to another is *evidence of conspiracy*.[44]

A difference in legal capacities in which the defendants are sued warrants denial of preclusion,[45] --a doctrine especially apt in the present case.[46] Lack of expertise is also a difference leading to denial of preclusion,[47] as is the presence, in the second action, of a federal source of right.[48] All these differences may be found in the present case.

3. The State Court's Judgment Was Not "On The Merits."

Judge Hirano's "review" of the arbitration award was thrice limited. He was not permitted to review the arbitration award de novo. He was not allowed to apply standard appellate review to determine if the arbitrator had committed legal error or had made findings of fact which were clearly erroneous or unsupported by substantial evidence. He was not even allowed to review the award for

"fraud, corruption, or undue means," as the Union had allowed the 10 day time limit for vacation to expire.

These facts distinguish the present case from Kremer. There, a New York appellate court reviewed a state Appeal Board decision affirming a state administrative agency. By statute, the scope of appellate review was limited to determining whether the administrative agency's decision was arbitrary. This Court held that the appellate court's affirmance was preclusive because it was a determination that the cause was "meritless." 456 U.S. at 479-480, and n. 21

Professor Davis has trenchantly written of Kremer:

> ...the Supreme Court's [decision] is analytically faulty, and clearly so.
>
> * * * *
>
> ...[T]he Appellate Division was reviewing the Appeal Board, whose authority was limited to deciding whether the Appeal Board's decision was "arbitrary, capricious, or an

> abuse of discretion." The Appellate Division's decision was res judicata on the question whether the NYHRD's decision was arbitrary, for that was the only question it could decide, and it could not be res judicata on the question of discrimination, which it could not decide.
>
> K. DAVIS, ADMIN. LAW TREATISE, §21.5 at 65 (2d Ed. 1983).

Professor Davis' comments aside, it is apparent that in the present case, Judge Hirano's "review" of the arbitration decision is a significant further step removed from the limited judicial review of Kremer, as he could not even determine whether the arbitrator's award was arbitrary. If Judge Hirano could not consider whether the award was arbitrary, then he could not (and did not) consider the merits. And if he could not consider the merits, then his confirmation order was not "on the merits" and not preclusive.

4. Caldeira's §1983 Claim Comes Under Exceptions to Preclusion.

The Court has on several occasions indicated that as a matter of federal

common law[49/] there are exceptions to preclusion.[50/] To date, the most vigorous explication of exceptions to preclusion has come in Haring, where, in a unanimous opinion written by Justice Marshall, the Court, after noting the exception for proceedings which were not "full and fair," went on to state:

> Moreover, additional exceptions to collateral estoppel may be warranted in § 1983 actions in light of the "understanding of § 1983" that "the federal courts could step in where the state courts were unable or unwilling to protect federal rights." Ibid. Cf. Id., at 95, n 7, 66 L Ed 2d 308, 101 S Ct 411; Board of Regents v. Tomanino, 466 US 478, 485-486, 64 L Ed 2d 440, 100 S Ct 1790 (1980) (42 USC § 1988 [42 USCS § 1988] authorizes federal courts, in an action under § 1983, to disregard an otherwise applicable state rule of law if the state law is inconsistent with the federal policy underlying § 1983).

462 U.S. at 313-314. [51]

Thus federal courts may except state judgments from preclusive effect when:

(1) state courts are unable or unwilling to protect federal

rights;

(2) state rules of law are inconsistent with federal policy underlying section 1983;

(3) the litigant has not freely and without reservation submitted his federal claims to state court; and

(4) when required by "special circumstances" not yet defined.

The Restatement also sets forth exceptions to preclusion including one based on unfair conduct by the adversary.[52/] On present facts, there are several reasons to consider one or more of these exceptions.[53/]

5. State Preclusion Law: Caldeira Was Ignorant Of His §1983 Claim and Under Hawaii Law Was Not Precluded.

The Ninth Circuit correctly noted that "...to determine...preclusion..., this court must look to the law of the state in question." Caldeira, 866 F. 2d at 964; APP. A p. 964; see also Allen, 449 U.S. at 96; Haring, 462 U.S. at 313. Yet the Ninth Circuit then proceeded to

ignore an argument made by Caldeira that under Hawaii law as set forth in the Hawaii Supreme Court's decision in Bolte v. Aits, Inc., 60 Haw. 58, 62, 587 P.2d 810 (1978), there is no preclusion if in the first suit the claimant was ignorant of the rights which he later asserted in the second suit.[54/]

This rule exactly fits the case at bar. Caldeira knew that he had labor law rights; and following his discharge, he sought arbitration and filed his HPERB charges. But he did not know that he also had a §1983 claim based upon liberty and property interests in and constitutional rights to his job. Not until consultation with his counsel, well after the arbitration decision, did he learned that he had such rights [CR 80 (Declaration of Ronald Caldeira)]. Accordingly, under settled Hawaii law, the arbitration award as confirmed by the

"judgment" of Judge Hirano did not have bar or merger effect and did not preclude Caldeira's §1983 claims; and the Ninth Circuit failed in its §1738 charter to properly determine and apply Hawaii preclusion law.[55/]

C. NOTWITHSTANDING ANY FAILURE OF CALDEIRA'S §1985(3) CONSPIRACY CLAIM AGAINST THE UNION AND ITS OFFICIALS FOR LACK OF CLASS-BASED ANIMUS, THEY HAD LIABILITY BOTH UNDER COMMON LAW AND UNDER §1983, WHICH THE NINTH CIRCUIT FAILED TO RECOGNIZE.

Laying aside the propriety of the Ninth Circuit's dismissal of Caldeira's suit against the Union and its officials for failure to allege class-based animus without allowing Caldeira an opportunity to amend his pleadings,[56/] the Ninth Circuit absolutely ignored two alternative theories of the Union's liability--one under state law and one under federal law (and neither depending on class-based animus)--as if Caldeira had never argued them.

1. Joint Tortfeasor Liability.

Paragraphs 24 and 26 of the amended complaint [R. 23-25] allege that the Union officials "participated" in the County's wrongful acts and were

> ...jointly liable therefor, by reason of their participation in certain aspects thereof, encouragement thereof, and acquiescence therein.

Joint tortfeasors are those who act "in concert" to accomplish some common purpose or plan and whose concerted acts cause the harm.[57/] The Restatement of Torts describes joint tortfeasors as those acting "in concert" with others and also those who give "substantial assistance or encouragment" to others. 4 RESTATMENT (SECOND) OF TORTS, §§876, 877 (1977). There was ample evidence on which a fair-minded jury could find that the Union acted in concert with the County or gave assistance or encouragement to the County. Therefore the Ninth Circuit should be reversed and the case remanded

for determination of Caldeira's pendent state law joint liability claim against the Union and its officials.

2. Joint Statutory Liability with the County under §1983.

Finally, as Caldeira noted to Judge Fong at the time of oral argument [Tr.50-51], the Union and its officials may also be held directly liable under §1983--the same section under which Caldeira sues the County and its officials. Unlike §1985(3), §1983 requires no showing of class-based animus. Instead, all that is necessary, in the language of the statute itself, is a showing that the defendants acted "under color of state law."

There can, of course, be no question that the County, a political subdivision of the State of Hawaii, and the County officials named as defendants herein, were acting under color of state law.

But what of the Union and the Union officials? Here, it is very well established--by three decisions of this Court and a number of lower court decisions--that when a private party, such as the Union, joins a public party, such as the County, which acts under color of state law and violates §1983, the private party is likewise said to be acting under color of law and is also liable under §1983.[58/]

The Ninth Circuit absolutely ignored the authorities cited in the note, which were discussed at length by Caldeira in his reply brief.

Conclusion: Reasons Why This Court Should Grant Certiorari

§1983 is a statute which, according to its framers "...throws open the doors of the United States courts to whose whose rights under the Constitution are denied or impaired." Cong. Globe, 42nd

Cong., 1st Sess., 374-376 (1871), as quoted in Mitchum, 407 U.S. at 240. The preclusion decisions of this Court close those doors when a plaintiff has fully litigated his §1983 claim in state proceedings.

Yet it would be a mistake to read Kremer so broadly as to mean that the federal courts no longer have any responsibility for oversight of state tribunals. The preclusion decisions of this Court, particularly Haring, still require the federal courts to interpose themselves when state tribunals are either "unable or unwilling" to protect federal interests or do not provide a full or fair hearing for the consideration of those interests. Thus the federal courts must oversee state courts at least to the extent of discerning whether this is so.

In Congressional debates over the

enactment of §1983, Representative Perry intoned:

> "Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; * * * Among the most dangerous things an injured party can do is to appeal to justice."
>
> Cong. Globe, 42d Cong., 1st Sess., App. 78, as quoted in Mitchum at 240.

That "much has changed" since this statement was made does not guarantee that in every case the judicial system will produce justice. In this case, Caldeira has yet to receive justice--one "full and fair" judicial trial (both of those words are laden with meaning) of his conspiracy claim. He did not have it before the arbitrator, as the Union had exclusive control of the hearing. He did not have it before Judge Hirano, as the Hawaii statutes did not allow it. He did not have it before Judge Fong, as Judge Fong held himself precluded. And he did

not have it before HPERB, as HPERB likewise held itself precluded.

Not all injustice can be corrected via certiorari. In this case, however, the Court should grant certiorari for five reasons.

First, the Court can establish in §1983 cases the hitherto "undefined" scope of mimimal due process required for preclusion [Rule 17.1(c)].

Second, the Court can determine whether the question of "full and fair" is one of fact which itself must be litigated in federal court before a §1983 claim can be precluded [Rule 17.1(c)].

Third, the Court can resolve conflicts between the Ninth Circuit in this case and a number of other circuits over whether §1983 claims are "different" and not precluded by prior state proceedings [Rule 17.1(a)];

Fourth, the Court can put right the

failure of the Ninth Circuit to properly apply Hawaii preclusion law, which was its duty under §1738.

Fifth, the Court can also put right the failure of the Ninth Circuit to consider alternative theories of Union liability which do not depend on "class-based" animus.

For these reasons, petitioner asks that certiorari be granted.

DATED: June 2, 1989.

L. Richard Fried
Attorney for Petitioner
Ronald Caldeira

FOOTNOTES

1/ The District Court Clerk's Record is cited "CR"; the Excerpts of Record filed with the Ninth Circuit is cited "ER". Where materials forming part of the record on appeal to the Ninth Circuit are included in the appendices accompanying this petition, they are cited "APP".

2/ Caldeira, on September 16, 1987, made a formal submission of some 798 pages of documentary evidence [CR 69] together with a 27 page Trial Memorandum [CR 70, ER 31-57], included as Appendix M, reviewing the evidentiary facts of the 12 episodes of the conspiracy.

3/ The Union's Manlapit is not to be confused with Mayor Malapit.

4/ Pursuant to HAW. REV. STAT. §658-12 [APP.A p. xix], this constituted the "entry of judgment"; and pursuant to HAW. REV. STAT. §658-14 [APP. A p. xxi], this "judgment" had "... the same force and effect, in all respects as, and is subject to all of the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered."

5/ Reconsideration was urged on three grounds: first, that the pending HPERB complaint tolled the one year statute only if completion of such administrative proceeding was a prerequisite to Caldeira's Civil Rights action [Id., pp. 3-4]--which was not the case as there was no exhaustion requirement; second, that the one-year filing period in HAW. REV. STAT. §658-8 was not a procedural statute of limitations but rather a jurisdictional condition on a substantive right which could not be tolled [Id., pp. 4-8]; and third, that the arbitration award should not be confirmed because it was procured by "corruption, fraud, or undue means" within the meaning of HAW. REV. STAT. §658-9(1) [Id., pp. 8-9].14/

6/ For a summary of Judge Fong's decision, see the Ninth Circuit's opinion herein, 866 F. 2d 1175 (9th Cir. 1989) [APP B].

7/ The collective bargaining agreement between the Union and the County [CR 76 (Ex. B to Ex. A)] sets forth the grievance procedure in Article 11 [Id., (pp. 6-8 of Ex. B to Ex. A)], which provides for arbitration as step 4 [loc. cit p. 7]. Article 11 then states: "The decision of the arbitrator shall be final and binding upon the Union, its members, the employees involved in the grievance, and the employer. There shall be no appeal from the arbitrator's decision by either party, if such decision is within the scope of the arbitrator's authority...." [loc. cit. p. 7]

8/ This statute [APP. A pp. xxi-xxii] states: "Unless the agreement for award provides that no appeal may be taken, an appeal may be taken from an order vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action, otherwise no appeal may be had."

9/ For a list of some 21 cases decided by the Court since 1979, see Luneberg, The Opportunity to Be Heard and the Doctrines of Preclusion: Federal Limits on State Law, 31 VILLA. L. REV. 81 at 82-83 n. 4 (1986).

10/ Nichol, Federalism, State Courts, and Section 1983, 73 VA. L. REV. 959, 1000 (1987). See also Blackmun, J., disssenting in Allen, 449 U.S. at 424, and Kremer, 456 U.S. at 501-504. This is an opinion shared by other writers. See, e.g., M. SCHWARTZ AND J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES, §9.10 p. 210 (1986) [hereafter "SCHWARTZ AND KIRKLIN"].

11/ For similar expressions of confidence in the state courts, see Kremer, 456 U.S. at 478; Allen, 449 U.S. at 105; Huffman v. Pursue, 420 U.S. 592, 599, 604 (1975) [reversing a district court injunction prohibiting enforcement of unconstitutional state statute "...in deference to...federalism...;" Younger v. Harris, 401 U.S. 37, 43-44 (1971) [same: emphasizing "'comity'" (defined as "...proper respect for state functions...") and "'Our Federalism'".

12/ Comment, Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?, 73 CORNELL L. REV. 817, 821 (1988).

13/ McDonald, 466 U.S. at 292; see also Alexander v. Gardner-Denver Company, 415 U.S. 36, 56-57 (1974) [holding arbitration "...comparatively inferior to judicial processes in the protection of Title VII rights"].

14/ As stated in Goldsmith and Braveman, Rules of Preclusion and Challenges To Official Action; An Essay on Finality, Fairness, and Federalism, All Gone Awry, 39 SYR. L. REV. 599, 603 (1988): "A brief review of the distinction between 'issue preclusion' (sometimes referred to as collateral estoppel) and 'claim preclusion' (referred to as res judicata) is necessary....Issue preclusion bars relitigation of an 'issue' that was actually determined in a prior suit. * * * Under claim preclusion, a final judgment on the merits bars relitigation of the same 'claim,' including not only all issues that were actually determined, but also those issues that were not raised but could have been." See also 18 C. WRIGHT, A. MILLER, AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE, §4402 at p. 7 (1981) [hereinafter cited "WRIGHT AND MILLER"]; 1B J. MOORE, J. LUCAS, AND T. CURRIER, MOORE'S FEDERAL PRACTICE, ¶0.401 at pp. 4-5 (2d Ed., 1987) [hereinafter cited "MOORE'S FEDERAL PRACTICE]; Allen, 449 U.S.

at 93; Migra, 465 U.S. at 547 n. 1; McDonald, 466 U.S. at 287 n.5.

15/ Allen, 449 U.S. at 105 [Blackmun, J., dissenting]; Goldsmith and Braveman, 39 SYR. L. REV., supra, 608.

16/ Nor has this Court mapped the contours of Kremer's and Montana's further injunction that there is no preclusion if "...there is reason to doubt the quality, extensiveness, or fairness of procedures followed in the prior litigation.

17/ See Luneberg, 31 VILLA. L. REV., supra, at 90; Friendly, "Some Kind of Hearing", 123 U. PA. L. REV. 1267, 1277-95 (1975). In Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), this Court, dealing with offensive collateral estoppel, indicated that the benchmark for testing procedural due process should be the Federal Rules of Civil Procedure.

18/ At a minimum, procedural due process in judicial proceedings requires that there be a hearing at which the litigant can produce evidence and cross-examine adverse witnesses. Luneberg, 31 VILLA. L. REV., supra, 90; Note, 88 HARV L. REV. 1510 (1975); II R. ROTUNDA, J. NOWAK AND J. YOUNG, TREATISE ON CONSTITIONAL LAW, §17.8 (1986); 16 AM. JUR. 2d, Constitutional Law, §572 et seq. (1979). Due process also requires that the hearing be conducted by a fair and impartial judge. Tumey vs. Ohio, 273 U.S. 510 (1927) [judge had pecuniary interest]; Ward v. Village of Monroeville, 409 U.S. 57 (1972) [same]; Luneberg, supra, 31 VILLA. L. REV., 90; II R. ROTUNDA, J. NOWAK AND J. YOUNG, supra, §17.8; see also, Redish and Marshall, Adjudicatory Independence And The Values Of Procedural Due Process, 95 YALE L.J. 455, 475-491 (1986).

19/ Luneberg, 31 VILLA. L. REV., supra, 90. In Silver v. Queen's Hospital, 63 Haw. 430, 440, 629 P. 2d 1116 (1983), involving a hospital hearing at which a physician was denied staff privileges, the Hawaii Supreme Court said: "Timely and adequate notice must be given to the applicant, or to the physician whose staff privileges are sought to be revoked, and such notice must contain specific information regarding the grounds or charges upon which the hospital is relying to either deny or to revoke these privileges."

20/ SCHWARTZ AND KIRKLIN, supra, § 9.8 p. 206, citing Lee v. Winston, 717 F. 2d 1229 (6th Cir. 1983), aff'd on other grounds, 105 S. Ct. 1611 (1985) [criminal pre-trial proceeding; request for adjournment denied which gave defendant "insufficient time...to prepare...."]; Silver v. Queen's Hospital, supra, 63 Haw. at 440, 629 P. 2d at _____, in which the Hawaii Supreme Court said: "The physician must be provided every reasonable...opportunity to show that the grounds specified...are either inadequate or baseless...."

21/ Blonder-Tongue, supra, 402 U.S. 313, 332-3 (1971); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979); Standefer v. United States, 447 U.S. 10, 22 (1980) [defensive collateral estoppel].

22/ HAW. REV. STAT. §658-6 [APP. A p.] provides that applications for confirmation shall be "...made and heard in a summary way in the manner provided for the making and hearing of motions...."

23/ SCHWARTZ AND KIRKLIN, supra, § 9.8 p. 205, citing Whitley v. Seibel, 676 F. 2d 245 (7th Cir. 1982), cert. den. 459 U.S. 942 (1982) [summary criminal preliminary hearing with no right of appeal]; compare Coogan v. City of Wixom, 820

F. 2d 438 (4th Cir. 1987) ["Some preliminary hearings are little more than formalities" which will not be preclusive]; Thourner v. Meyer, 803 F. 2d 1093 (10th Cir. 1986) [1 day notice and 4 day total life of state court action]; cf. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 526 (1931) [hearing to determine personal jurisdiction requires that parties be "fully" heard].

24/ Although HAW. REV. STAT. §658-9(1) [APP. A. p. xvi] permits vacation of award where procured by "corruption, fraud, or undue means", H.R.S. §658-11 requires that a motion to vacate be brought "within 10 days after the award is made and served" [APP. A pp. xviii-xix]. In Caldeira's case, no such motion was filed by the Union, which had exclusive control of the arbitration on Caldeira's behalf, within this 10-day time limit or at all. Thus, when the County moved for confirmation two and one-half years later, there was no defense to the motion on the merits.

25/ Judge Hirano committed clear legal error, which was not reviewable. He denied a reasonable request for continuance made by Caldeira at the first hearing so that Caldeira could brief the tolling issue. And, as indicated by the transcripts of hearing, he exhibited disrespect for Caldeira's legal position, giving it short shrift and ruling without any articulation of his decision.

26/ Judge Hirano, despite being furnished, now, with a legal memorandum exploding the County's tolling position, refused to change his mind.

27/ Luneberg, 31 VILLA. L. REV., supra, 90. In Silver, supra, 63 Haw. at 440-441, 629 P. 2d at ___, the Hawaii Supreme Court said: "The decision of the board must be in writing and any

denial or revocation may not stem from unreasonable, arbitrary, capricious, or discriminatory considerations. Its findings of fact must be supported by substantial evidence. Such evidence has been defined by the court to mean that quantum and quality of evidence which would warrant a reasonable man in reaching a conclusion. Shinn v. Yee, Ltd., 57 Haw. 215, 553 P. 2d 733 (1976)."

28/ See Silver, quoted n. 35 supra; Comment, 73 CORN. L. REV., supra, at 829-830, 848 [desirable agency procedures include "decision made on the evidence"], citing Parker v. Nat'l Corp.for Housing Partnership, 619 F. Supp 1061, 1065 (D.D.C. 1985) [required elements of agency procedure include findings and conclusions].

29/ RESTATEMENT (SECOND) OF JUDGMENTS, supra, §20(a) [prior judgment no bar "[w]hen the judgment is one of dismissal for lack of jurisdiction...."], §26(1)(c) [no improper splitting of cause of action when "...plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction"]; Morris, How Many Bites Are Enough? The Supreme Court's Decision in University of Tennessee v. Elliott, 55 TENN. L. REV. 205, 246 (1988) ["...collateral estoppel applies only if the prior tribunal had subject matter jurisdiction over the issues litigated before it."]; SCHWARTZ AND KIRKLIN, supra, 205-206 ["The most obvious example of lack of a full and fair opportunity is a state proceeding in which a federal constitutional claim may not be asserted. A determination in such a proceeding could not preclude the litigation of a constitutional claim in a federal court §1983 action."].

30/ There, this Court held that an award of disability benefits under the Virginia Workmen's Compensation Act could not preclude the claimant from later obtaining a supplemental award of benefits in the District of Columbia, because the Virginia Worker's Compensation Commission had no power to determine the extra-territorial effects of its decisions; and "...full faith and credit need not be given to determinations that it had no power to make [citing what is now Restatement §26(c)(1)]." Id., at 281-283. See Luneberg, 31 VILLA. L. REV., supra, at 168.

31/ Hirst v. California, 770 F. 2d 776, 778 (9th Cir. 1985) [federal courts have exclusive jurisdiction over Title VII claims, so state employment discrimination determination not claim preclusive, but issue preclusion applied]; Trujillo v. County of Santa Clara, 775 F. 2d 1359 (9th Cir. 1985) [same]; Norco Constr., Inc. v. King County, 801 F. 2d 1143 (9th Cir. 1986); Garrett v. City and County of San Francisco, 818 F. 2d 1515 (9th Cir. 1987) [same; but issue preclusion not applied because not clear that issue of disparate treatment was actually litigated in state court]; Healy v. Town of Pembroke Park, 831 F. 2d 989, 992 (11th Cir. 1987) [same; §1983; state employee relations agency had no jurisdiction or power to award compensatory damages]; Whitfield v. City of Knoxville, 756 F. 2d 455 (6th Cir. 1985) [same; action under ADEA; claim could not have been raised in earlier action]; Miller v. Hartwood Apartments, 689 F. 2d 1239 (5th Cir. 1982) [same; §1983]; Negin v. City of Mentor, 601 F. Supp 1502 (N.D. Ohio 1985) [same; §1983]; Bottini v. Sadore Mgt. Corp., 764 F. 2d 116 (2nd Cir. 1985) [same; Title VII].

Hawaii preclusion law is to the same effect: Silver, supra, 63 Haw. at 438, 629 P. 2d at ___; Hall v. State, 7 Haw. App. __, 756 P. 2d 1048, 1054 (1988).

32/ SCHWARTZ AND KIRKLIN, supra, § 9.8, p. 204, citing Jones v. Barnes, 103 S. Ct. 3308, 3312 (1983); Lindsey v. Normet, 405 U.S. 56, 77 (1972); Resnick, Precluding Appeals, 70 CORN. L. REV. 603, 607 (1985), citing Griffin v. Illinois, 351 U.S. 12, 18-20 (1956); but see RESTATEMENT (SECOND) OF JUDGMENTS, supra, §28(1).

33/ Compare Sherrer v. Sherrer, 334 U.S. 343, 348 (1948); RESTATEMENT (SECOND) OF JUDGMENTS, supra, §12(3) and comment e [preclusion to litigate jurisdictional issues]; Id. §28 [setting forth exceptions to preclusion generally and providing in subsection (1) that there is no preclusion if "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action...."]; Standefer v. United States, supra, 447 U.S. 10, 22-24 (1980) [criminal prosecution; because of restrictive rules of evidence and lack of opportunity to appeal, it may be unfair to preclude previously litigated issues; in absence of review, underlying premise of issue preclusion--that correct result was reached--may be unwarranted].

34/ Did the arbitrator have any idea about the long-standing conspiracy? Did Judge Hirano? How much time did Judge Hirano spend (apart from the 45 minutes in court) in reviewing the submissions of the parties--particularly, Caldeira's conspiracy evidence? Did he make notes? Did he read the cases cited in Caldeira's motion to reconsider on the County's tolling doctrine? Did he do independent research? Did he have a law clerk? What did his law clerk conclude?

35/ This is not a fanciful suggestion. Justice Stevens, dissenting in Elliot, has also noted, 478 U.S. at ___, 106 S. Ct. at 3228, n. 1, that "...the §1983 claim may be litigated in

federal court, at least to the extent of determining whether the complainant was afforded a full and fair opportunity to litigate before the state administrative tribunal.***"

36/ 1B MOORE'S FEDERAL PRACTICE, supra, ¶ 0.410[1] pp. 348-349, ¶ 0.443[2] pp. 760-761; McDonald, 466 U.S. at 287, n.5.

37/ The merger aspect of res judicata or claim preclusion will also prevent a second suit on any claim which "could have" been raised in the first case even though it was not. SCHWARTZ AND KIRKLIN, supra, §9.2; Allen, 449 U.S. at 93; Silver, 65 Haw. at 435-36, 629 P. 2d at ____.

38/ See authorities cited in n. 44 supra.

39/ 1B MOORE'S FEDERAL PRACTICE, supra, ¶ 0.443[3], pp. 768-9; 2 J. COOK AND J. SOBIESKI, CIVIL RIGHTS ACTIONS, ¶3.22 at p. 3-216-2 (1988) [hereinafter "COOK AND SOBIESKI"]; Haring, 462 U.S. at 315.

40/ 1B MOORE'S FEDERAL PRACTICE, supra, ¶ 0.410[1] pp. 359-361, RESTATEMENT, supra, §24, Luneberg, 31 VILLA. L. REV., supra, 105-6.

41/ In addition to the cases cited n. 39 supra, see also Nilsen v. City of Moss Point, 674 F. 2d 379 (5th Cir. 1982), reversed en banc, 701 F. 2d 556 (5th Cir. 1983); Stafford v. Muscogee County Bd. of Educ., 688 F. 2d 1383 (11th Cir. 1982); Miller v. Hartwood Apts., 689 F. 2d 1239 (5th Cir. 1982); Kelly v. Warminster Township Bd. of Supervisors, 512 F. Supp. 658 (E.D.Pa. 1981), aff'd 681 F. 2d 806 (3rd Cir. 1982) [unpublished]; Washington V. City of Evanston, 535 F. Supp. 638 (N.D. Ill. 1982); Davidson v. Capuano, 792 F. 2d 275 (2d Cir. 1986) [unlikely damages could have been awarded in a state judicial review proceeding].

But see, contra, Punton v. City of Seattle, 805 F. 2d 1378 (9th Cir. 1986); Campbell v. City of Allen Park, 829 F. 2d 576 (6th Cir. 1987); Gregory v. Chehi, 843 F. 2d 111 (3d Cir. 1988).

42/ Two Ninth Circuit decisions so hold yet went uncited in Caldeira: Shaw v. California Dep't. of Alcoholic Beverage Control, 788 F. 2d 6070 (9th Cir. 1986); Shapely v. Nevada Bd. of State Prison Comm'rs, 766 F. 2d 404 (9th Cir. 1985) (per curiam) [both actions brought in federal court]. For decisions in other circuits, see Brown v. Edwards, 721 F. 2d 1442 (5th Cir. 1984); Smith v. Updegraff, 744 F. 2d 1354 (8th Cir. 1984); Jones v. City of Alton, 757 F. 2d 878 (7th Cir. 1985); McLaughlin v. Alban, 775 F. 2d 389 (D.C. Cir. 1985) (per curiam); McAdoo v. Lane, 564 F. Supp. 1215 (N.D. Ill. 1983), aff'd sub nom., McAdoo v. Thomas, 1774 F. 2d 1168 (7th Cir. 1985); Barnell v. Payne, Webber, Jackson & Curtis, Inc., 614 F. Supp. 373 (S.D.N.Y. 1985); Battle v. Isaac, 40 Fair Empl. Prac. Cas. (BNA 1664 (N.D. Ill. 1986).

43/ I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F. 2d 1541 (11th Cir. 1986) [issues not identical]; Drum v. Nasuti, 648 F. Supp. 888 (E.D.Pa. 1986), aff'd 831 F. 2d 286 (3d Cir. 1987) [same; unpublished opinion].

44/ Smith v. Updegraff, supra, 744 F. 2d 1354, 1361-1363 (8th Cir. 1984) [wrongful discharge; state administrative proceeding limited; federal action involved new evidence of conspiracy; both claim and issue preclusion denied]; compare Mack v. South Bay Beer Distribs., Inc., 798 F. 2d 1279 (9th Cir. 1986) [age discrimination; state court proceeding not adequate when record not clear that evidence was introduced on each issue]; and cf. the decision of this Court in FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1952) [second prosecution for use of exclusive agreements not barred where first

case was based on conspiracy and second case was not]; contra, Flores v. Edinburg Consol. Ind. Sch. Dist., 741 F. 2d 1773 (5th Cir. 1984) [operative facts of second §1983 action in federal court were same as first state court tort action; plaintiff could have brought §1983 claims in state court]

45/ Headley v. Bacon, 838 F. 2d 1272, 1279 (8th Cir. 1987) [first Title VII suit against defendants in their official capacity does not preclude second §1983 suit against them in individual capacities]; Gregory v. Chehi, supra, 843 F. 2d 111 (3d Cir. 1988) [same]; but cf. Thurston v. United States, 810 F. 2d 438 (4th Cir. 19887) [Bivens action].

46/ Caldeira's arbitration, and Judge Hirano's confirmation thereof, involved only the Union and the County, whereas in his §1983 action, Caldeira sued not only the entities (the County and the Union) but also the officials of each, in both their official and individual capacities [see List of Parties, supra].

47/ Shaw v. California Dept. of Alcoholic Bev. Control, supra, 788 F. 2d 6070, 607-09 (9th Cir. 1986) [state alcohol board has expertise in enforcing liquor laws, not in making constitutional adjudications]; cf. McDonald: arbitrators "...do not have the expertise required to resolve the complex legal questions that arise in §1983 actions." [466 U.S. at 290].

48/ Brantley v. Surles, 718 F. 2d 1354 (5th Cir. 1983) [first action involved state property rights; second §1983 action involved federal constitutional privacy rights]; RESTATMENT, supra, §§86(1) and (2) [no bar if federal claim arises "...under scheme of federal remedies which contemplates that the federal claim may be asserted notwithstanding the adjudication in state court."]; but see 1B MOORE's FEDERAL PRACTICE,

supra, ¶0.410][1] at p. 363, noting that the Restatement was promulgated before Kremer and is "...seriously misleading."

49/ "...we have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute [citations omitted]." Elliott, ___U.S. at ___, 106 S. Ct. at 3224.

50/ Montana, 440 U.S. at 155: ("...other special circumstances [may] warrant an exception to the normal rules of preclusion."); Allen, 449 U.S. at 101: (there might be "...an exception to res judicata and collateral estoppel where state law did not provide fair procedures....").

51/ In footnote 17, Justice Marshall referred to Montana and added that "other conditions" might exist for preclusion, including "special circumstances" as where, quoting Montana, a litigant has not """freely and without reservation submit[ted] his federal claims for decision by the state courts...and ha[d] them decided there...."' (quoting England v. Medical Examiners, 375 U.S. 411, 419...(1964))."

52/ The Restatement's list of RESTATEMENT, supra, §26-f [claim preclusion: exception for "extraordinary reason" such as "...failure of the prior litigation to yield a coherent disposition...."; §28(5)(c) [issue preclusion: exception when "...party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity...."]. As Moore notes, this is tantamount to an estoppel applied against the party seeking preclusion because of his unfair conduct. 1B MOORE'S FEDERAL PRACTICE, supra, ¶ 0.441[3.--3] at p. 739.

53/ First, Judge Hirano showed himself to be indifferent to federal rights, granting a

motion to confirm which was flagrantly out-of-time. Second, Caldeira did not choose to have his day in court in summary proceedings before Judge Hirano where he had no real opportunity to put on his case. Third, the County appears to have gained Judge Hirano's confirmation order by sharp practice--giving notice of motion which did not reveal its true grounds, and then citing theretofor uncited cases in oral argument which Caldeira was unprepared, without a continuance which he was denied, to rebut. Fourth, "special circumstances" exist warranting an exception to preclusion because Caldeira has never had a "full and fair opportunity" to litigate his conspiracy claim.

54/ There the Hawaii Supreme Court said: "We adhere to the rule adopted by the majority of jurisdictions that have dealt with the problem that a former recovery will not bar claims of which the plaintiff was ignorant, even if those claims existed at the time suit was commenced in the former recovery and could have been joined, unless plaintiff's ignorance was due to his own negligence [numerous citations of authority deleted]."

55/ See Haring, 462 U.S. at 314, n. 8.

56/ The Union argued for the first time in its answering brief in the Ninth Circuit that under United Brotherhood of Carpenters v. Scott, 463 U.S. 825, 834-35 (1983) and Griffin v. Breckenridge, 403 U.S. 88, 102 (1971), Caldeira's §1985(3) conspiracy case against the Union and its officials required that Caldeira plead and prove an "...invidiously discriminatory racial or class based animus...." Observing that Caldeira had not so alleged in his complaint, the Ninth Circuit then denied him leave to do so on remand (Caldeira averred in his reply brief that he could readily allege on remand that as a Portuguese, which was a protected class, he was dis-

criminated against by the Japanese County and Union officials). Caldeira, 866 F. 2d at 657-658, n. 5; APP B pp. 657-658.

57/ W. PROSSER AND P. KEETON, THE LAW OF TORTS, §46 at 322 (5th Ed. 1984); 3 F. HARPER, F. JAMES, AND O. GRAY, THE LAW OF TORTS, §10.1 at 12 (2d Ed. 1986).

58/ Dennis v. Sparks, 449 U.S. 24, 27-28 (1980); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); United States v. Price, 383 U.S. 787, 784 (1966). In Dennis, this Court said: "...to act 'under color of' state law for §1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. * * * Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970); United States v. Price, 383 U.S. 787, 794 (1966)..."

These cases were followed (although sometimes the rule was held inapplicable) in Green v. Francis, (6th Cir. 1983) 705 F. 2d 846, 850 [there was "sufficient nexus" between public officials and non-public officials]; Brinkmann v. Johnston, 793 F. 2d 111, 112 (5th Cir. 1986); Grameros v, Jewel Companies, Inc., 797 F. 2d 432, 435 (7th Cir. 1986); Malak v. Associated Physicians, Inc., 784 F. 2d 277 (7th Cir. 1986); and Storey v. United States, 629 F. Supp. 1174, 1176 (N.D. Miss. 1986). See generally 2 J. COOK AND J. SOBIESKI, CIVIL RIGHTS ACTIONS, supra, §7.11 at p. 7-44 (1986). The precursor of these decisions may have been Burton v. Wilmington Park Authority, 365 U.S. 715 (1961). There a private restaurant refused admission to blacks. Because the restaurant leased the situs of the restaurant from the state, it was held that the restaurant owner had "so far insinuated itself" into a position of "interdependence" as to be a "joint participant" with the state. Hence there was state action and a violation of substantive due process.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF HAWAII)
)
SS.
CITY AND COUNTY OF HONOLULU)

I, L. Richard Fried, being first duly sworn, depose on oath and state that I am a member of the Bar of the Supreme Court of the United States; and that on the 2nd day of June, 1989, a date within the time permitted, I served copies of the Petition for Writ of Certiorari on Respondents by causing copies to be mailed in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

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Subscribed and sworn to before me
this 2nd day of June, 1989.

Notary Public, State of Hawaii
My commission expires: 10/3/89
8967A

Supreme Court, U.S.
FILED
JUN 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RONALD CALDEIRA, Petitioner

v.

COUNTY OF KAUAI;
HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,

AFSCME LOCAL 152, AFL-CIO,
et al., Respondents

ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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APPENDICES

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Constitutional and Statutory Provisions

U.S. CONSTITUTION, ART. IV §1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. §1738

The records and proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. Section 1983

Section 1983 Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the consitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. section 1979; Pub. L. 96-170, section 1, Dec. 29, 1979, 93 Stat. 1284

§ 1985. Conspiracy to interfere with civil rights

Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice;
intimidating party, witness or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with

intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State of Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or

threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. § 1980.

CHAPTER 658
ARBITRATION AND AWARDS

SECTION

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§658-1 **Agreement to submit.** A provision in a written contract to settle by arbitration a controversy thereafter arising out of the contract or the refusal to perform the whole or any part thereof, or an agreement in writing to submit an existing controversy to arbitration pursuant to section 658-2, shall be valid, enforceable, and irrevocable, save only

upon such grounds as exist for the revocation of any contract. [CC 1859, §925; RL 1925, §2924; am L 1925, c 276, pt of §1; RL 1935, §4170; RL 1945, §8701; RL 1955, §188-1; HRS §658-1; am L 1972, c 90, §2(a)]

§658-2 **Agreement to submit existing controversy.** Save in the case of an infant, or a person incompetent to manage the person's affairs, two or more persons may agree in writing to submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the agreement to submit which arises out of a contract, or the refusal to perform the whole or any part thereof, or the violation of any other obligation. They may also so agree that a judgment of a circuit court shall be rendered upon the award made pursuant to the submission. They may also specify the judicial circuit in which the judgment shall be entered. If the writing does not specify the

judicial circuit, the judgment may be entered in any judicial circuit. [CC 1859, §926; RL 1925, §2925; am L 1925, c 276, pt of §1; RL 1935, §4171; RL 1945, §8702; RL 1955, §188-2; HRS §658-2; am imp L 1984, c 90, §1]

§658-3 **Compelling compliance with agreement; jury trial when.** A party aggrieved by the failure, neglect, or refusal of another to perform under an agreement in writing providing for arbitration, may apply to the circuit court for an order directing that the arbitration proceed in the manner provided for in the agreement. Five days' notice in writing of the application shall be served upon the party in default. Service thereof shall be made in the manner provided for service of a summons. The court shall hear the parties, and upon being satisfied that the making of the agreement or the failure to comply therewith is not in issue, the court

hearing the application shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or the default is in issue, the court shall proceed summarily to the trial thereof.

A jury trial may be demanded by either party before or at the time of the return and if such demand is made, the issue shall be tried before a jury, otherwise the court shall hear and determine the issue.

If the jury, if tried by a jury, or the court, if tried by the court, finds that no agreement in writing providing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury, if the trial is before the jury, or the court, if the trial is before the court, finds that a written provision for arbitration was made and that there is a

default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. [CC 1859, §927; RL 1925, §2926; am L 1925, c 276, pt of §1; RL 1935, §4172; RL 1945, §8703; RL 1955, §188-3; HRS §658-3; am L 1972, c 90, §2(b), (c)]

§658-4 **Naming arbitrators.** If, in the agreement, provision is made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed. If no method is provided therein, or if a method is provided and any party thereto fails to avail himself of the method, or for any other reason there is a lapse in the naming of an arbitrator or arbitrators, or umpire, or in filling a vacancy, then, upon application by either party to the controversy, the circuit court shall designate and appoint an arbitrator or arbitrators, or umpire, as the case may

require, who shall act under the agreement with the same force and effect as if he or they had been specifically named therein. Unless otherwise provided, the arbitration shall be by a single arbitrator. [CC 1859, §928; RL 1925, §2927; am L 1925, c 276, pt of §1; RL 1935, §4173; RL 1945, §8704; RL 1955, §188-4; HRS §658-4]

§658-5 **No trial if issue referable to arbitration.** If any action or proceeding is brought upon any issue referable to arbitration under an agreement in writing, the circuit court, upon being satisfied that the issue involved in the action or proceeding is referable to arbitration under such an agreement in writing, shall stay the trial of the action or proceeding until the arbitration has been had in accordance with the terms of the agreement, provided the applicant for the stay is not in default in proceeding with the arbitration. [CC 1859, §929; RL 1925,

§2928; am L 1925, c 276, pt of §1; RL 1935, §4174; RL 1945, §8705; RL 1955, §188-5; HRS §658-5; am L 1972, c 90, §2(d)]

§658-6 **Application to court heard in summary way.** Any application to the court hereunder shall be made and heard in a summary way in the manner provided for the making and hearing of motions, except as otherwise herein expressly provided. [CC 1859, §930; RL 1925, §2929; am L 1925, c 276, pt of §1; RL 1935, §4174; RL 1945, §8706; RL 1955, §188-6; HRS §658-6; am L 1972, c 90, §2(e)]

§658-7 **Witnesses; attendance.** The arbitrators selected either as prescribed in this chapter, or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them a book or paper. The fees for attendance shall be the same as the fees of witnesses before circuit

courts. The summons shall issue in the name of the arbitrator or arbitrators or a majority of them, shall be signed by the arbitrators or a majority of them, shall be directed to such person and shall be served in the same manner as subpoenas to testify before a court of record. If any person so summoned to testify refuses or neglects to obey the summons, upon petition the circuit court may compel the attendance of such person before the arbitrator or arbitrators, or punish such person for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the circuit court. [CC 1859, §931; RL 1925, §2930; am L 1925, c 276, pt of §1; RL 1935, §4176; RL 1945, §8707; RL 1955, §188-7; HRS §658-7]

§658-8 Award; confirming award. The award shall be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate,

and delivered to one of the parties or the party's attorney. A copy of the award shall be served by the arbitrators on each of the other parties to the arbitration, personally or by registered or certified mail. At any time within one year after the award is made and served, any party to the arbitration may apply to the circuit court specified in the agreement, or if none is specified, to the circuit court of the judicial circuit in which the arbitration was had, for an order confirming the award. Thereupon the court shall grant such an order, unless the award is vacated, modified, or corrected, as prescribed in sections 658-9 and 658-10. The record shall be filed with the motion as provided by section 658-13, and notice of the motion shall be served upon the adverse party, or the adverse party's attorney, as prescribed for service of notice of a motion in an action in the same court. [CC 1859, §932; RL 1925, §

2941; am L 1925, c 276, pt of §1; RL 1945, §8708; am L 1949, c 347, §1; RL 1955, §188-8; HRS §658-8; am L 1972, c 90, §2(f); am imp L 1984, c 90, §1]

§658-9 **Vacating award.** In any of the following cases, the court may make an order vacating the award, upon the application of any party to the arbitration:

(1) Where the award was procured by corruption, fraud, or undue means;

(2) Where there was evident partiality or corruption in the arbitrators, or any of them;

(3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the

rights of any party have been prejudiced;

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite ward, upon the subject matter submitted, was not made.

Where an award is vacated and the time, within which the agreement required the award to be made, has not expired, the court may in its discretion direct a rehearing by the arbitrators. [CC 1859, §933; RL 1925, §2932; am L 1925, c 276, pt of §1; RL 1935, §4178; RL 1945, §8709; RL 1955, §188-9; HRS §658-9]

§658-10 **Modifying or correcting award.** In any of the following cases, the court may make an order modifying or correcting the award, upon the application of any party to the arbitration:

(1) Where there was an evident miscalculation of figures, or an

evident mistake in the description of any person, thing, or property, referred to in the award;

(2) Where the arbitrators have warded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof, and promote justice between the parties. [CC 1859, §934; am L 1911, c 115, §1; RL 1925, §2933; am L 1925, c 276, pt of §1; RL 1935, §4179; RL 1945, §8710; RL 1955, 188-10; HRS §658-10]

658-11 **Notice of motion to vacate, modify, or correct; stay.** Notice of a motion to vacate, modify, or correct an

award, shall be served, in the manner prescribed for service of notice of a motion in an action, upon the adverse party or the adverse party's attorney within ten days after the award is made and served. For the purposes of the motion any judge who might make an order to stay the enforcement of a judgment, in an action brought in the same court, may make an order to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. The record shall be filed with the motion as provided by section 658-13. [CC 1859, §935; RL 1925, §2934; am L 1925, c 276, pt of §1; RL 1935, §4180; RL 1945, §8711; RL 1955, §188-11; HRS §658-11; am L 1972, c 90, §2(g); am imp L 1984, c 90, §1]

§658-12 **Entry of judgment.** Upon the granting of an order, confirming, modifying, or correcting an award, the same shall be filed in the office of the clerk of the circuit court and this shall

constitute the entry of judgment. An appeal may be taken from such judgment as hereinafter set forth. [CC 1859, §936; am L 1911, c 115, §2; RL 1925, §2935; am L 1925, c 276, pt of §1; RL 1935, §4181; RL 1945, §8712; RL 1955, §188-12; HRS §658-12; am L 1972, c 90, §2(h)]

§658-13 Record to be filed with motion. (a) The party moving for an order confirming, vacating, modifying, or correcting an award shall at the time the motion is filed with the clerk also file the following papers with the clerk:

(1) The agreement; the selection or appointment, if any, of an additional arbitrator, or umpire; and each written extension of the time, if any, within which to make the award; and

(2) The award.

(b) Each notice, affidavit, or other paper, used or to be used upon an

application to confirm, vacate, modify,or correct the award, and a copy of each order of the court upon such an application, shall be filed with the clerk the same as in a civil action. [L 1925, c 276, pt of §1; RL 1935, §4182; RL 1945, §8713; RL 1955, §188-13; HRS §658-13; am L 1972, c 90, §2(i)]

§658-14 **Effect of judgment.** The judgment entered in accordance with section 658-12 has the same force and effect, in all respects as, and is subject to all provision of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered. [L 1925, c 276, pt of §1; RL 1935, §4183; RL 1945, §8714; RL 1955, §188-14; HRS §658-14; am L 1972, c 90, §2(j)]

§658-15 **Appeal when.** Unless the agreement for award provides that no appeal may be taken an appeal may be taken

from an order vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action, otherwise no appeal may be had. [L 1925, c 276, pt of §1; RL 1935, §4184; RL 1945, §8715; RL 1955, §188-15; HRS §658-15]

FOR PUBLICATION

UNITED STATES COURT APPEALS FOR THE NINTH CIRCUIT

RONALD CALDEIRA,
Plaintiff-Appellant,
v.
COUNTY OF KAUAI, et al.,
Defendants-Appellees.

No. 87-2959
D.C. No.
CV-85-0869-HMF
OPINION

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief Judge, Presiding

Argued and Submitted
November 18, 1988—Honolulu, Hawaii

Filed February 2, 1989

Before: Richard H. Chambers, Diarmuid F. O'Scannlain and Stephen S. Trott, Circuit Judges.

Opinion by Judge Trott

SUMMARY

Courts and Procedure

Affirming a judgment finding a termination proper, the court held that arbitration proceedings are entitled to preclusive effect in subsequent federal proceedings.

Appellant Ronald Caldeira alleged, pursuant to 42 U.S.C. § 1983, that his employer, County of Kauai, violated his con-

stitutional rights when it terminated his employment. He also alleged his former union was liable as a co-conspirator with defendant County under 42 U.S.C. § 1985(3). Caldeira asserted twelve "episodes" of alleged wrongdoing by the defendants which were ostensibly designed to effect his ultimate discharge. "Episode" eleven was the crux of his section 1983 claims. He disobeyed an order to do some yard and janitorial work because he considered it a demotion. As a result, he was suspended and discharged. An arbitrator found that the work orders were proper. Caldeira was insubordinate, and the County had proper cause to dismiss him. The Hawaii Fifth Circuit affirmed. The district court granted defendants' motion for summary judgment. The district court judge ruled that he was precluded from considering "episode" eleven because the Hawaii state court had confirmed the arbitration award, making it binding upon the federal district court under the Full Faith and Credit Statute.

[1] The state court's confirmation of the arbitration award constitutes a judicial proceeding for purposes of 28 U.S.C. § 1738 and must be given the full faith and credit it would receive under state law. [2] Three basic questions must be answered in the affirmative before collateral estoppel may be applied. [3] Because the same occurrence underlies both actions, the first prerequisite of issue preclusion is met. [4] The state court's confirmation of the arbitrator's award was a final judgment on the merits. [5] The same parties were involved in both the state and federal proceedings. [6] Because the minimal procedural requirements of the due process clause were satisfied, [7] Caldeira was properly barred from pursuing his section 1983 claims in federal court by the prior Hawaii proceedings. [8] Because the defendants alleged wrongdoings arising from "episodes" one through ten constituted neither the cause in fact nor the proximate cause of Caldeira's injury [9] the district court correctly concluded that Caldeira was collaterally estopped from attempting to establish some other "improper" cause for his discharge. [10]

Finally, Caldeira failed to prove his 42 U.S.C. § 1985(3) claim.

COUNSEL

Robert A. Smith, Honolulu, Hawaii, for the plaintiff/appellant.

Warren C.R. Perry, Lihue, Hawaii, for the defendant/appellee County of Kauai.

Charles K.Y. Khim, Honolulu, Hawaii, for the defendant/appellee Hawaii Government Employees' Association.

OPINION

TROTT, Circuit Judge:

Ronald Caldeira appeals from an adverse summary judgment in his civil rights action against his former employer and union. Caldeira alleged, pursuant to 42 U.S.C. § 1983, that his employer, County of Kauai ("County"), violated his constitutional rights when it terminated his employment. Caldeira also alleged his former union, Hawaii Government Employee's Association ("Union"), was liable as a co-conspirator with defendant County under 42 U.S.C. § 1985(3). The district court granted summary judgment in favor of both the County and the Union. We affirm.

I

FACTS AND PROCEEDINGS

Ronald Caldeira was hired as a lifeguard by defendant County in 1978. Caldeira held this position from 1978 until

he was discharged on October 11, 1983. Caldeira alleged that beginning in late 1978 or early 1979, the County developed and engaged in a conspiracy to effect his discharge without just cause. Caldeira also alleged that defendant Union joined in this conspiracy with the County beginning in June 1980.

The gravamen of Caldeira's civil rights claim is that he had a substantive due process right to employment by virtue of the clause in a collective bargaining agreement which provided that, as a county employee, he would not be terminated except for proper cause. To substantiate his claim, Caldeira asserted twelve "episodes" of alleged wrongdoing by the defendants which were ostensibly designed to effect his ultimate discharge.

The district court approached the disposition of the defendants' summary judgment motion in terms of the alleged twelve "episodes." "Episodes" one through ten involved alleged wrongdoing by defendant County to develop a negative work record and hostile work environment for Caldeira in order to effect his eventual discharge. "Episodes" three through ten also involved wrongdoing by defendant Union, in which Caldeira claimed it conspired with the County by acquiescing in the scheme to effect his discharge by failing to represent him adequately and thereby promote the development of his negative work record and hostile work environment.

As the district court recognized, "episode" eleven was "the crux of [Caldeira's] section 1983 claims against defendant County." Excerpt of Record (ER) 78 at 3. It involved incidents occurring during the pool's closing in 1983, when Caldeira was ordered to do some yard and janitorial work. Because he considered this a demotion in his work status, Caldeira disobeyed these work orders. As a result, Caldeira was suspended and discharged by the County. Pursuant to the collective bargaining agreement with the County, defendant

Union invoked the arbitration procedure and represented the plaintiff therein.

"Episode" twelve involved the alleged wrongdoing of the defendants to distort and misrepresent the record presented to the arbitrator to prevent Caldeira from having a fair hearing and thereby recover his job.

On January 15, 1985, the arbitrator found that the work orders were proper, Caldeira was insubordinate, and the County had just and proper cause to dismiss him. On July 16, 1985, Caldeira filed this action in the federal district court. On September 25, 1987, the Hawaii Fifth Circuit affirmed the arbitration decision.

On October 9, 1987, the district court granted defendants' motion for summary judgment. The district court judge, Harold M. Fong, ruled that he was precluded from considering "episode" eleven because the Hawaii state court had confirmed the arbitration award, making it binding upon the federal district court under the Full Faith and Credit Statute, 28 U.S.C. § 1738. Judge Fong concluded that once the "linchpin" ("episode" eleven) of Caldeira's §§ 1983 and 1985 causes of action was removed, "episodes" one through ten were not sufficient to sustain Caldeira's claims, as they were not the cause of Caldeira's discharge. Judge Fong then ruled that, as to "episode" twelve (the arbitration itself), Caldeira had presented no evidence from which a jury could infer the existence of a conspiracy between the two defendants.

Judgment was entered dismissing Caldeira's action on October 13, 1987. On October 26, 1987, the district court denied Caldeira's motion for reconsideration. Caldeira timely appeals.

II

ISSUES ON APPEAL

1. Did the district court err in giving preclusive effect to the Hawaii state court judgment upholding Caldeira's discharge?

2. Did the district court err in failing to find a conspiracy between defendant County and defendant Union?

III

STANDARD OF REVIEW

We review de novo a district court's ruling on the availability of res judicata both as to claim preclusion and issue preclusion. *Guild Wineries and Distilleries v. Whitehall Co.*, 853 F.2d 755, 758 (9th Cir. 1988). If available, we review the district court's application of the doctrine for abuse of discretion. *Eilrich v. Remas*, 839 F.2d 630, 632 (9th Cir.), *cert. denied*, 109 S.Ct. 60 (1988). A grant of summary judgment is reviewed de novo. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986).

IV

DISCUSSION

A. Preclusive Effect of State Proceedings

It is well established that, even in a suit under section 1983, 28 U.S.C. § 1738 requires federal courts give the same "full faith and credit" to the records and judicial proceedings of any state court that they would receive in the state from which they arise.[1] *Migra v. Warren City School Dist. Bd. of*

[1]Title 28 U.S.C. § 1738 provides in pertinent part:

> The records and judicial proceedings of any court of any . . . state

Educ., 465 U.S. 75 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980). It is equally well settled that 28 U.S.C. § 1738 requires federal courts give an administrative adjudication reviewed by a state court the same "full faith and credit" the adjudication would enjoy in the state's own courts. *Mack v. South Bay Beer Dist., Inc.*, 798 F.2d 1279, 1283 (9th Cir. 1986)(citing *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *McDonald v. City of West Branch*, 466 U.S. 284 (1984)).[2]

While the Supreme Court has not directly addressed the issue of whether an arbitrator's decision that has been reviewed by a state court is entitled to preclusive effect, *see, e.g., Byrd*, 470 U.S. at 223 ("The question of what preclusive effect, if any, the arbitration proceedings might have is not yet before us . . . and we do not decide it"), it has consistently held that an *unreviewed* arbitration decision does not preclude a federal court action. *See, e.g., McDonald*, 466 U.S. at 288-92; *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 742-45 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-60 (1974).

. . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken.

[2]The federal courts have frequently fashioned federal common law rules of preclusion where § 1738 does not apply. In the context of unreviewed administrative proceedings, issue preclusion has been upheld in subsequent lawsuits where the administrative agency acted in a "judicial capacity" in resolving disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. *University of Tennessee v. Elliott*, 478 U.S. 788, 797-98 (1986)(quoting *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 421-422 (1966)); *Eilrich v. Remas*, 839 F.2d at 632. This common law rule of preclusion, however, has not been extended to arbitration hearings, "in part on the ground that arbitration cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223 (1985).

[1] However, the considerations that motivated the Supreme Court to deny preclusive effect to unreviewed arbitration decisions are not present in a case like the one before us, which involves a reviewed arbitration decision. The Supreme Court has declined to create a common law bar to relitigation of unreviewed arbitration decisions, reasoning that because arbitration is not a "judicial proceeding" within the meaning of section 1738, preclusion is not statutorily required. *See McDonald*, 466 U.S. at 288. Here, in contrast, the plain language of section 1738 controls, requiring us to give the state court's determination preclusive effect. The state court's confirmation of the arbitration award constitutes a judicial proceeding for purposes of section 1738, and thus must be given the full faith and credit it would receive under state law. *See Rider v. Pennsylvania*, 850 F.2d 982, 994 (3d Cir. 1988), *cert. denied*, _ S.Ct. _, (U.S. Dec. 12, 1988)(No. 88-488)(giving preclusive effect in a subsequent Title VII suit to a state court's review of an arbitrator's decision).

To determine whether the requirements of issue preclusion have been satisfied, this court must look to the law of the state in question. *Takahashi v. Board of Trustees*, 783 F.2d 848, 850 (9th Cir.), *cert. denied*, 476 U.S. 1182 (1986); 28 U.S.C. § 1738. If, under Hawaii law, Caldeira is precluded from litigating his claims in state court, he cannot pursue them in federal court unless the prior state proceedings did not provide him a full and fair opportunity to present his claims. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81 (1982).

1. Preclusion Under Hawaii Law

As the district court noted, the "linchpin" of Caldeira's section 1983 action rests on the allegation that defendant County terminated his employment "when no good cause existed therefore." ER 34 at 5. The district court concluded that this substantive due process claim had been raised and decided by the state circuit court. It held that Hawaii preclu-

sion law would therefore prevent Caldeira from relitigating the claim in state court.

[2] Under Hawaii law, as generally, three basic questions must be answered in the affirmative before "collateral estoppel," or issue preclusion, may be applied: "(1) Was the issue decided in the prior action identical with the issue presented in the present action? (2) Was there a final judgment on the merits in the prior action? (3) Was the party against whom the doctrine is asserted a party or in privity with a party to the previous adjudication?" *Silver v. Queen's Hospital*, 63 Haw. 430, 436, 629 P.2d 1116, 1121 (1981)(citation omitted).

[3] Isolating the alleged wrongful act is critical to the first inquiry—identity of the issue. In this case, a single event, the October 11, 1983 discharge, gave rise to both state and federal proceedings. Pursuant to the Union's collective bargaining agreement, Caldeira availed himself of an arbitration hearing to challenge the termination of his employment. After a two-day arbitration hearing, the arbitrator found that Caldeira was insubordinate in the face of reasonable and legitimate work orders, and that "proper and just cause" existed for the October discharge. CR 60 at 32. The state circuit court, in confirming the arbitrator's award, necessarily determined that proper cause existed for Caldeira's discharge due to insubordination. This was the identical issue raised by Caldeira in "episode" eleven of his federal claim. By invoking the Constitution and section 1983, Caldeira has merely presented a new legal theory upon which he seeks to recover. *See Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 651-52 (9th Cir. 1988); *see also Takahashi*, 783 F.2d at 851 (section 1983 action barred when it merely asks to look at contractual right of employment from a different angle). Because the same occurrence underlies both actions, the first prerequisite of issue preclusion is met.

[4] Similarly, it cannot be seriously contested that the state court's confirmation of the arbitrator's award was anything

but a final judgment on the merits. Confirmation of the arbitration decision constitutes an entry of judgment under Hawaii Rev. Stat. § 658-12. Section 658-12 provides:

> Upon the granting of an order confirming, modifying, or correcting an award, the same shall be filed in the office of the clerk of the circuit court and this shall constitute the entry of judgment. An appeal may be taken from such judgment as hereinafter set forth.

Furthermore, Hawaii Rev. Stat. § 658-14 specifies the effect of that judgment:

> The judgment entered in accordance with Section 658-12 has the same force and effect in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered.

[5] Finally, the third prerequisite of issue preclusion is easily satisfied. The same parties were involved in both the state and federal proceedings.

Appellant relies largely on *Bottini v. Sadore Management Corp.*, 764 F.2d 116 (2d Cir. 1985), to support his proposition that arbitration proceedings are never entitled to preclusive effect in a subsequent federal proceeding, even where a state court has reviewed the arbitrator's decision. Such reliance is misplaced.

Bottini involved a building superintendent who was discharged for unsatisfactory job performance due, at least in part, to his absence from work on Sunday mornings while attending meetings of the Jehovah Witnesses. An arbitrator subsequently found good cause for the discharge. The arbitrator's decision was challenged by Bottini in state court. After

his petition was denied. Bottini brought no further appeal. He then commenced a Title VII action in federal district court, alleging religious discrimination. That action was dismissed on res judicata grounds. On appeal, the Second Circuit reversed, holding that the state proceedings did not constitute a judgment on the merits of Bottini's Title VII action, and did not afford Bottini a full and fair opportunity to litigate his Title VII claim.

Bottini is clearly distinguishable from the instant case. Unlike Hawaii Rev. Stat. §§ 658-12 and 658-14, the New York statute involved in *Bottini*, Article 75, CPLR, allowing for review of an arbitrator's award, does not provide that confirmed arbitration awards have the effect of a state court judgment and may be enforced as such.

Furthermore, unlike the arbitration and state court proceedings in this case—each of which were concerned with whether proper cause existed for Caldeira's discharge—neither the arbitration nor the state court proceedings in *Bottini* addressed the religious discrimination claim. *See also Rider*, 850 F.2d at 992 n.12 (distinguishing *Bottini* on similar grounds).

2. Full and Fair Opportunity to Litigate

Before a person can be denied access to federal courts through the preclusive effect of a state court proceeding, it must be established that he received a "full and fair opportunity" to litigate his claim in the state proceedings. *Kremer*, 456 U.S. at 480-81; *see also Haring v. Prosise*, 462 U.S. 306, 317-18 (1983)("As a general matter, even when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state law, '[r]edetermination of [the] issues [may nevertheless be] warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation' ")

(quoting *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979)).

When determining whether a party received a full and fair opportunity to litigate an issue, the inquiry is whether the minimum due process requirements guaranteed by the fourteenth amendment are satisfied. The Supreme Court, in *Kremer*, explained this inquiry in the following manner:

> Our previous decisions have not specified the source or defined the content of the requirement that the first adjudication offer a full and fair opportunity to litigate. But for present purposes, where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law.

456 U.S. at 481.

[6] The minimal procedural requirements of the due process clause were clearly satisfied in this case. Caldeira had a "full opportunity to present [his contentions] on the record" during the state proceedings. *Kremer*, 456 U.S. at 483; *see also Rider*, 850 F.2d at 991-92 (due process requirements examined in light of both the arbitration and state court proceedings). Caldeira was represented by counsel during the course of the two-day arbitration hearing where he submitted documentary evidence and exhibits, called witnesses, cross-examined witnesses, and testified on his own behalf. His attorney objected to evidence on the record and submitted post-hearing briefs.

Caldeira was duly served with defendant County's motion for confirmation of the arbitration award, filed a memorandum in opposition to the motion, and made oral argument during a hearing before the state circuit court. He filed a

motion for reconsideration of the order confirming the arbitration award, submitted an original as well as a supplemental memorandum, and made oral argument in support of the motion. This motion was subsequently denied.[3] Pursuant to Hawaii Rev. Stat. § 658-9, Caldeira filed a motion to vacate the arbitration award in which he argued the award was procured by "corruption, fraud or undue means." This motion was denied for lack of evidence.

Still undaunted, Caldeira filed a petition for writ of mandamus, prohibition or certiorari to the Hawaii Supreme Court, on the assumption that this was his only means of seeking review of the state court's confirmation order. The petition was dismissed. Caldeira then appealed the denial of his motion to vacate, as well as the order confirming the arbitration award, to the Hawaii Supreme Court. This appeal was dismissed as untimely.[4] One might ask, "How many games must the defendant win before the match is finally over?"

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[3]Caldeira objects to the summary manner in which the state court's confirmation order was rendered. Specifically, he draws attention to the fact that Hawaii Rev. Stat. § 658-13 requires only the arbitration agreement and the arbitrator's award be filed as the record in conjunction with a motion for confirmation. The record indicates, however, that the state court was presented with more than the collective bargaining agreement and the award before rendering its confirmation order. Nevertheless, as the Eleventh Circuit has recognized, "[t]he teaching of *Kremer* . . . is that federal courts must accord preclusive effect to issues litigated and decided on the merits, even though the review on the merits is sharply limited." *Sykes v. McDowell*, 786 F.2d 1098, 1103 (11th Cir. 1986).

Caldeira similarly objects to the limited argument held on the County's motion for confirmation of the arbitration award. During oral argument on the County's motion, however, Caldeira elected only to argue that the County's motion was time-barred. Thus, Caldeira is hardly in a position to complain; he had adequate opportunity to challenge the arbitrator's award on a variety of other grounds. *See* Hawaii Rev. Stat. §§ 658-9 and 658-10. In any event, the subsequent motion for reconsideration, and argument held on that motion, squarely attacked the merits of the arbitrator's decision.

[4]Caldeira was apparently under the mistaken belief that the state circuit court's confirmation order was unappealable. Thus, by the time his erroneous assessment was corrected, it was too late to do so. In any event, his failure "to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Kremer*, 456 U.S. at 485.

[7] It is overly apparent that Caldeira received a full and fair opportunity to litigate his claim as measured by minimal due process. He is thus barred from pursuing his section 1983 claims in federal court by the prior Hawaii proceedings.

3. "Episodes" One Through Ten

[8] The district court noted that the substance of Caldeira's federal claim was the alleged wrongful termination of his employment arising from "episode" eleven. Because it had been decided in the judicially confirmed arbitration award that the discharge was self-inflicted by Caldeira's insubordination in the face of a valid work order, the court found itself "bound to accept this causal connection." ER 82 at 4. Accordingly, the district court found that the alleged wrongdoings of the defendants arising from "episodes" one through ten constituted neither the cause in fact nor the proximate cause of Caldeira's injury. *Id.* We agree.

[9] Summary judgment in favor of the defendants was appropriate in regard to these alleged "episodes." The district court correctly concluded that, as a matter of law, Caldeira was collaterally estopped from attempting to establish some other "improper" cause for his discharge. *See, e.g., Wozniak v. DuPage County,* 845 F.2d 677 (7th Cir. 1988)(where it was determined in a prior mandamus action that proper cause existed for denying plaintiff an excavation permit, subsequent § 1983 action alleging defendants conspired to refuse issuance of the permit was properly dismissed on collateral estoppel grounds).

B. Section 1985(3) Conspiracy Claim

[10] The substance of Caldeira's section 1985(3) claim was that the Union conspired with the County to effect his discharge by allegedly failing to adequately represent him during grievance and arbitration proceedings. On appeal, he con-

tends the district court erred in granting summary judgment on this claim. We find no error.

First, to prove a section 1985 conspiracy between a private party and the government under section 1983, the plaintiff must show an agreement or "meeting of the minds" by the defendants to violate his constitutional rights. *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983)(citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970)). The district court correctly concluded that Caldeira had wholly failed in this regard and that his conspiracy allegations were unsupported by any evidence, circumstantial or otherwise, that would convince a "fair-minded jury" to find in his favor. ER 82 at 5.

Second, pursuant to the above analysis, Caldeira failed to satisfy the causal relationship between the alleged acts done in furtherance of the "conspiracy" and his resulting injury. *See Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)("A person subjects another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that *causes* the deprivation of which the complaint is made. . . . (Emphasis added)").

Third, the absence of a section 1983 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same allegations. *Cassettari v. Nevada County, Cal.*, 824 F.2d 735, 739 (9th Cir. 1987)(citing *Dooley v. Reiss*, 736 F.2d 1392, 1395 (9th Cir.), *cert. denied*, 469 U.S. 1038 (1984)).

Finally, Caldeira never alleges invidiously discriminatory, racial or class-based animus, which is necessary to state a claim under section 1985(3). *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 834-35 (1983); *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).[5]

[5]Consistent with the *post hoc* rationalizations that pervade his claims, Caldeira suggests in his reply brief that we remand so he may be given leave

V

CONCLUSION

The district court judgment is

AFFIRMED.

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to further amend his complaint to allege that as a Portuguese he is a member of a class protected under section 1985(3). Caldeira's retrospective attempt to phrase his case in "national-origin" terms is not persuasive. In any event, it would not be sufficient to overcome the other deficiencies of his section 1985 claim.

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STATE OF HAWAII

In the Matter of Arbitration Between HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, AFSCME 152, Union and DEPARTMENT OF PUBLIC WORKS COUNTY OF KAUAI Employer	Grievance of RONALD CALDEIRA

AWARD OF ARBITRATOR

This arbitration was initiated by the Hawaii Government Employees' Association, AFSCME, Local 152, AFL-CIO, herein "Union" against the County of Kauai Department of Public Works, herein "Employer" on behalf of Ronald Caldeira, herein "Grievant". The grievance is for a three day

suspension and for discharge.

The hearing was held in Lihue, Kauai, on September 27 and 28, 1984.

Exhibits for Employer were marked as "County Exhibits" and the Exhibits introduced were:

Joint Exhibit 1	Labor Agreement: July 1, 1981 to June 30, 1983
County Exhibit A	Job Description of Recreation Assistant I or II for County of Kauai.
County Exhibit B	Position Description of Recreation Assistant II, SR 13 for Position No. 1652, County of Kauai, dated September 17, 1975.
County Exhibit C	Standard Operating Procedures, Kapaa Swimming Pool.

County Exhibit D	Station Log (Daily) for Kapaa Pool by Grievant from 9-17-83 to 10-11-83.
County Exhibit E	Memorandum to County Engineer for Director of Recreation re: Issuance of Operational Manual to Grievant.
County Exhibit F	Three day suspension memorandum to Grievant, dated September 26, 1983.
County Exhibit G	Letter dated October 17, 1983 discharging Grievant effective November 1, 1983.
County Exhibit H	County of Kauai Employee History Record of Grievant.

County Exhibit I	Four photographs, dated September 27, 1983 showing condition of yard and ground under bleachers at Kapaa Pool.
County Exhibit J	Six photographs, dated September 27, 1983 showing condition of men's and women's showers, women's showers, and yard and ground under bleachers.
Union Exhibit I	Photograph, dated September 27, showing condition of yard at Kapaa Pool. (Same photograph as contained in County Exhibit 1.)

Union Exhibit 2	Photograph, dated September 27, 1983 showing condition of ground under bleachers at Kapaa Pool.
Union Exhibit 3	Photograph, dated September 27, 1983 showing condition of ground under bleachers.
Union Exhibit 4	Photograph, dated September 27, 1983 showing condition of men's shower. (Similar to photograph in County Exhibit J.)

Appearances for the parties were:

For the Employer: Warren C.R. Perry, Esq.
Second Deputy County Attorney

For the Union: Charles K.Y. Khim, Esq.

Also present:

For the Employer: Herbert Doi
County Personnel Director

For the Union: Davis Yogi
Ray Emura

Witnesses were:

Philip Kekahu
Wilson Miyashiro
Gordon Shibao
Lawrence Kitamura
Sid Kini
Ronald Caldeira (Grievant)

FACTS

The Grievant Ronald Caldeira was suspended for three days, October 1, 2, and 3, 1983. Then by letter dated October 17, 1983 Grievant was discharged effective November 1, 1983. The suspension and discharge were separate actions, but both were based on work performance which were characterized as being insubordinate to prior work orders.

Grievant was the Recreation Assistant II assigned to the Kapaa swimming pool. Grievant was in charge of the pool facility and sole worker from January 13, 1978 to discharge (County Ex. H). His duties were to supervise the activities of the pool and to maintain the pool, the bleachers, restrooms, showers, and the grounds (County Exs. A and B).

Sometime in April of 1983, the filtration system for the pool became

inoperable, and there were considerable problems in the installation of the new filtration system. Because of public complaints about the condition of the pool and the length of time to make this pool operable, Philip Kekahu of the Kekaha Pool and Sid Kini of the Waimea Pool were temporarily assigned to work at Kapaa Pool and to assist in the installation of the new filtration system.

On September 16, 1983, in the presence of Lawrence Kitamura, County Engineer, Wilson Miyashiro, Director of Recreation, County of Kauai, instructed Grievant that his duties were to cut grass, dig weeds and to brick-scrub the showers. Brick-scrub is when an abrasive soft stone is used to scrub the tile walls and floors which because of accumulated soap film and dirt cannot be removed by soap or cleansing chemicals (Tr.I 97, 98). The other Recreation Assistant IIs Kekahu

and Kini were assigned to the pool itself (Tr.I 97), and their duties were to drain the pool, clean the algae, scrape and paint the pool. They were also to assist the Contractor in the installation of the filtration system so that it would be operable.

The Kapaa Pool consisted of the pool itself, bleachers on two lateral sides of the pool, restrooms and showers at the rear side. The front and one lateral side had grass borders that were narrow in width but ran the length of the boundaries. Under the bleachers were square areas called beds that were four feet square. There were 32 to 34 beds under each of the two bleachers which were sandy and in which weeds grew.

Mr. Miyashiro and Gordon Shibao, Superintendent of Parks and Recreation, went to the Kapaa Pool several times a week to check on the installation of the

new filtration system for the pool. Both testified that they were not satisfied with Grievant's work. As to weeding, Mr. Miyashiro went to one bed and demonstrated how to weed the bed and how the bed should appear after the weeding (no weeds visible). This demonstration took 2 and 1/2 minutes, but Mr. Miyashiro testified that 5 to 10 minutes would be an acceptable time to weed one bed. Also Mr. Miyashiro testified that he demonstrated to Grievant how to scrub the restrooms.

On September 26, 1983, the weeding not being done to Mr. Miyashiro's satisfaction, Grievant was ordered not to weed but to scrub the restrooms (Tr.I 104). The cleaning was to be completed by October 5, 1983. Also on this day, Wilson Miyashiro in the presence of Gordon Shibao gave Grievant the suspension notice (County Exhibit F, dated September 26, 1983). The suspension was for the three

days of October 1, 2 and 3, 1983. The notice recited the prior orders to weed and mow, scrub and clean the showers and restrooms and then stated:

> "My inspection of your work progress is that the men's shower and washroom facilities is totally unsatisfactory as there is still white film of soap deposits on the walls and the floors still appear to be filthy. I have noticed that you have not started scrubbing work on the women's shower and restroom facilities."
>
> * * * * *
>
> "Your apparent disregard of lawful orders issued to you by competent authority (Supervising Lifeguard Hookano and myself) to perform general housekeeping and groundskeeping work, constitutes

insubordination and I am therefore suspending you three (3) days without pay, effective October 1 through October 3, 1983.

Further occurrence of insubordination or failure to perform satisfactorily will lead to more severe disciplinary measures."

Grievant reported to work on October 4, 1983 but left at 11 a.m. on sick leave because of pains in his left hand and did not work on October 5, 1983. Grievant had cut the palm of his left hand on September 17, 1983 while cutting the grass with a "cut cane knife" (machete) and reported the cut to Wilson Miyashiro (County Ex. D - Grievant's daily log of 9-17-83). Grievant returned to work on October 8, 1983. On October 9, 1983, Wilson Miyashiro and Gordon Shibao inspected the

Kapaa Pool and found the restroom areas not satisfactorily scrubbed and ordered Grievant to report to a meeting at the County Engineer Lawrence Kitamura's office on October 11, 1983. At this meeting Grievant was notified that effective November 1, 1983 his employment with the County of Kauai was terminated.

On October 17, 1983, the termination letter was given to Grievant which recited the orders and events from September 16, 1983 to date of letter which were the causes for termination.

Because the letter summarizes the County's reasons for suspension and discharge it is quoted in full:

"Dear Mr. Caldeira:

> This letter reduces to writing the discussion which took place at a meeting I had with you on October 11, 1983. Others present at the meeting were: Messrs. Ray Emura, Kauai Division Director (Acting) of the HGEA; Wilson Miyashiro, Director of Recreation; and Gordon Shibao, Superintendent of Parks and Recreation. Mrs.

Lillian Sakaguchi, Private Secretary, was also in attendance to take notes of this meeting.

At the meeting, we discussed your work record and job performance as a Recreation Assistant II, SR 13, assigned to the Kapaa Swimming Pool. More specifically, we focused on your disregard of lawful orders issued to you by your immediate supervisor, and your non-compliance with appropriate job assignments and responsibilities at the Kapaa Swimming Pool.

On September 16, 1983, at about 10:15 you were ordered to remove weeds from under the bleachers and to scrub down the walls of the ladies' restroom by September 20, 1983. You agreed at the time you did have necessary supplies and tools to perform the work. You also agreed that the work would be completed by September 20, 1983. Your work progress was monitored by your immediate supervisor at about 5:30 p.m. on Saturday, September 17, 1983, whereby only ten of approximately 30, 4' x 4' bays under the Mauka bleachers and a portion of the lawn next to the restrooms were cleaned.

On Tuesday, September 20, 1983, at about 10:30 a.m., Mr. Gordon Shibao, Superintendent of Parks and Recreation and your immediate supervisor, Wilson Miyashiro, arrived at the Kapaa Pool to follow up on your

progress. You were asked by your supervisor whether your injured left hand was impeding your work and you said that it was not. You were also asked whether you were able to complete the ordered assignment by the end of this work day to which you said that you didn't think so. You were then asked how long it would take you to complete the work to which you said, "maybe two days".

On September 21 and 24, 1983, your supervisor visited the Kapaa Swimming Pool and found your assigned tasks to be either incompleted or unsatisfactorily performed.

You were suspended for three days effective October 1 through 3, 1983 for being insubordinate to prior orders issued by your supervisor. You were also advised that further occurrences of insubordination or failure to perform satisfactorily would lead to more severe disciplinary action.

In addition, on September 26, 1983, you were ordered to stop weeding due to your unsatisfactory progress. Mr. Miyashiro ordered you to scrub down the ladies' restroom before October 5, 1983. This assignment included the scrubbing of walls in the shower and restroom as well as the footbath and floor. At that time, you were again advised that failure to comply with the

order would lead to severe disciplinary action or the termination of your employment for the overall good of the public service.

On October 4, 1983, Mr. Miyashiro went to the Kapaa Swimming Pool to inspect your work progress. He found that only the footbath walls were cleaned and that less than 5% of your assigned tasks were completed satisfactorily. You were not working at the time as you had called in sick earlier that morning because you were experiencing pain in your left hand. On October 5, 1983, you again took sick leave because of pains in your left hand. On October 8, 1983 you worked as scheduled.

On October 9, 1983, Messrs. Miyashiro and Shibao visited the Kapaa Swimming Pool and found that you had not satisfactorily complied with Mr. Miyashiro's order to scrub down the restroom area. Consequently, you were advised to be present at a meeting in my office on October 11, 1983.

After discussing the above, you were given verbal notification that effective November 1, 1983, your employment with the County of Kauai will be terminated for the good of the service. Your disregard of lawful orders issued by competent authority constitutes insubordination and

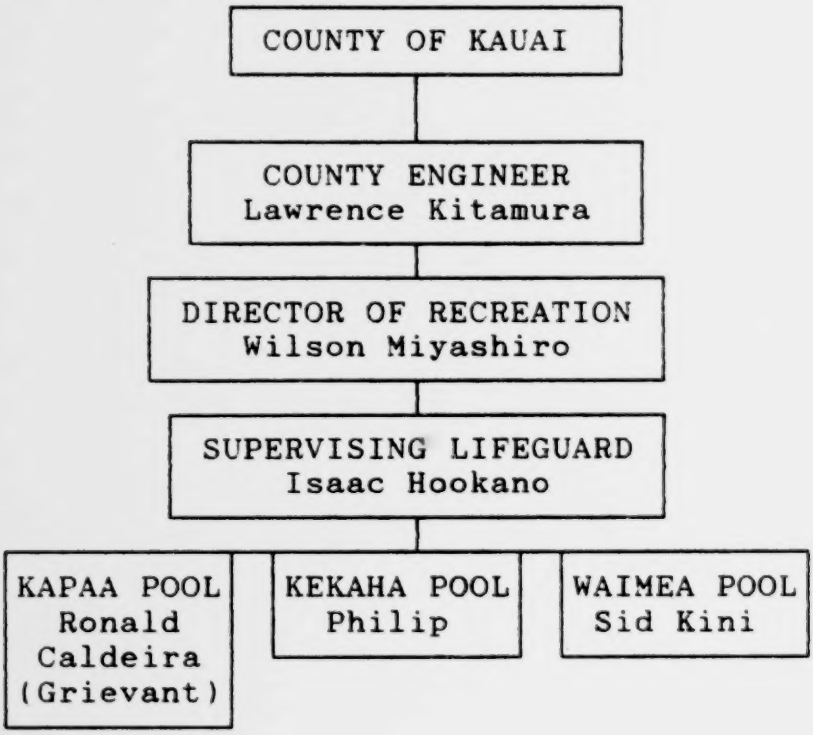
your inefficient and careless manner in which you perform your duties cannot be tolerated. Such poor performance and insubordination by any employee is detrimental to the efficiency of government service.

Please be advised that this letter shall serve as written notice to you of your dismissal from service effective November 1, 1983.

Very truly yours,

LAWRENCE KITAMURA
County Engineer"

At this point the organization chart as to personnel and supervisors for the County Pools is helpful in understanding the positions of the persons involved.



County Exhibit D is the daily station logs of the Kapaa Pool from September 17, 1983 to October 11, 1983. The log is an hourly account of work time and is in Grievant's handwriting and is certified as true and correct with Grievant's

signature. The log covers fourteen working days. A summary of the log showed the hours spent by Grievant in his assigned tasks and the dates his superiors were at the pool:

Saturday, September 17:

> Pursuant to Wilson Miyashiro's orders - 2 hours spent on cleaning out bathrooms and 5 hours in pulling weeds along and under bleachers (Gordon Shibao at Kapaa Pool).

Sunday, September 18:

> 1 hour to clean bathroom - 7 hours pulling weeds along and under bleachers.

Monday, September 19:

> 1 hour to clean bathroom - 7 hours pulling weeds and adding chlorine to pool (Gordon Shibao and Wilson Miyashiro at Kapaa Pool in the morning).

Tuesday, September 20:

1 hour to clean bathroom - 7 hours pulling weeds and adding chlorine to pool (Gordon Shibao and Wilson Miyashiro at Kapaa Pool in the morning. Grievant ordered to complete weeding of bleachers and cleaning of women's restrooms in two working days).

Wednesday, September 21:

8 hours pulling weeds along Girls' side of pool and along front wall (Wilson Miyashiro took photographs of entire grounds in the morning).

Saturday, September 24:

8 hours of pulling weeds on men's side of pool (Gordon Shibao and Wilson Miyashiro at Kapaa Pool at end of work day).

Sunday, September 25:

8 hours pulling weeds on men's side of pool.

Monday, September 26:

3 hours pulling weeds on men's side of pool. 5 hours to clean women's bathroom with the block. At 11:28 a.m. Grievant given notice of suspension for three days, October 1, 2 and 3, 1983 by Wilson Miyashiro in presence of Gordon Shibao. Grievant ordered to complete the cleaning of women's bathroom by October 5th.

Tuesday, September 27:

8 hours scrubbing women's bathroom (Wilson Miyashiro and Gordon Shibao at Kapaa Pool. Mr. Shibao took photographs of grounds, showers and restrooms).

Wednesday, September 28:

8 hours of scrubbing women's bathroom.

Tuesday, October 4:

2 hours scrubbing women's shower. At 11 a.m. took sick leave because of pain in palm of left hand from cut of

September 17.

Saturday, October 8:

8 hours scrubbing women's shower room with block, Ajax and a green pad.

Sunday, October 9:

8 hours scrubbing women's bathroom with block, Ajax and green pad (Gordon Shibao and Wilson Miyashiro inspected Kapaa Pool and told Grievant to attend a meeting in the County Engineer's office on October 11,1983).

Tuesday, October 11:

2 hours at County Engineer's office where received notice of termination.

5 hours pulling weeds and 1 hour scrubbing women's bathroom.

From Grievant's daily log it is documented that in ten (10) working days from September 17 through September 28, 1983, Grievant spent 53 hours weeding and cutting grass and 5 hours cleaning the

bathrooms and 21 hours scrubbing the women's bathroom. From October 4 through October 11, 1983, in 3 and 1/2 working days, Grievant spent 19 hours scrubbing the women's bathroom. (There is no log for October 10, 1983 and therefore not known whether it was a work day.)

County Exhibits I and J and Union's Exhibits 1, 2, 3 and 4 are thirteen photographs taken by Gordon Shibao on September 27, 1983 of the Kapaa Pool. Six of the photographs are of the grounds under and around the Mauka bleachers, four of the photographs are of the grounds under and around the Makai bleachers, one photograph was of a wall in the men's shower, one photograph was of the wall and floor of the men's restroom and one photograph was of a wall and floor of the women's shower.

Because the photographs cannot be included in these facts, brief

descriptions thereof are made. The photographs of the men's shower shows two square feet of white film on a blue tile wall between two shower arms. The photograph of the men's restroom entrance shows a white film on a four by eight foot area on the floor with a clear line separating the cleaned inner portion of the tiled floor, but with the white film six inches wide continuing along the wall, the blue tile wall has a white film above the floor area. The photograph of the women's shower shows the white film of varying widths on the rust colored tile floor next to the wall and a white film on a pink tile wall.

The photographs of the grounds under and around the Mauka bleachers show tall weeds growing next to the fenceline and the base of the front and rear of the bleachers and around a utility pole and tree stump; and under the bleachers in the

beds, the photographs show growth of weeds from sparse to a very definite growth. The photographs of the grounds around and under the Makai bleachers show an abundant and tall weed growth next to a hollow tile wall and garbage can; and under the bleachers in the beds, the photographs show some beds with very few weeds to beds with an abundant growth.

The testimony of the County Engineer, the Superintendent of Parks and Recreation and the Director of Recreation were all to the effect that the cutting of grass, weeding under the bleachers and the cleaning of the bathrooms and restrooms were so unsatisfactory that discliplinary action was necessary.

As to weeding, from Mr. Miyashiro's testimony that five to ten minutes was more than a sufficient time to complete the weeding in a four by four foot bed and that there were 64 to 68 beds under the

bleachers, the weeding could be completed within eleven hours of work time. Philip Kekahu who replaced Grievant at Kapaa Pool until his promotion to Supervising Lifeguard, testified that he took four to six hours to weed under one bleacher and thus would take eight to twelve hours for both bleachers. This testimony verified Mr. Miyashiro's estimate of the time needed to weed under both bleachers.

As to the white film on the restroom and shower walls and floors. both Philip Kekahu and Sid Kini who performed the same jobs as Grievant at the Kekaha and Waimea Pools testified that with daily maintenance of cleaning and hosing down the walls and floors, the white film would not be present and brick-scrubbing would not be necessary.

Sid Kini who was called as a Union witness testified that in October of 1983 he was instructed to clean the showers

because they were "pretty bad, pretty dirty".

> "....if a daily routine is kept up and it's not neglected, scrubbing like the way I did at the .... it shouldn't have had to be done. I would say out of negligence, it was really kind of bad so it had to be done."
>
> "....over a period of time, like, even your own bathroom, if you got a bathroom shower, bathroom tub, if you don't scrub your shower, you probably know what can happen. Dirt builds, accumulation of dirt. And to get in there and get it off you got to get in there and physically scrub it off or use some kind of chemical to get rid of it."

Mr. Kini testified that this was the condition of the shower at Kapaa Pool at the time of the suspension and termination (Tr.II 25, 26).

There was testimony that Grievant did not have a lawn mower to mow the grass. This was noted at the top of his daily log sheets in County Exhibit D. Arrangements had been made for Grievant to borrow a lawn mower from the Kapaa Neighborhood Center which was close to the pool. However, Grievant was not allowed to borrow the lawn mower because he had broken it (Tr.II 55,56). Grievant had told Isaac Hookano the Supervising Lifeguard that he could not borrow the lawn mower, and this was known by Wilson Miyashiro, Director of Recreation. On September 16, 1983, the County Engineer Kitamura was at Kapaa Pool and after noting that there were "weeds all over the place" (Tr.II 6) instructed Grievant to

cut the grass with a machete or "cut cane knife" when he was told Grievant did not have a lawn mower (Tr.II 44).

Grievant's prior disciplinary record is contained in County Exhibit H on August 30, 1979 and again on October 4, 1979, Grievant received letters of warning. On July 7 and 8, 1980 Grievant was suspended for insubordination. On January 28, 1981, Wilson Miyashiro recommended a five day suspension for substandard performance but no action was taken by the County Engineers. On June 17, 1981, there was a ten day suspension by the County Engineer which the Mayor reduced to five days of which four days were deferred. From February 1, 1982 to March 1, 1982, Grievant received twenty working days of suspension for a November 11, 1981 incident of negligence and dereliction to duty.

On the prior disciplinary record, County Engineer Kitamura testified that he looked at this record but that because these actions were under a prior administration under which he did not hold office, he wanted to give Grievant a chance to prove to Mr. Kitamura's satisfaction that the work could be performed, hence the suspension rather than a termination (Tr.II 6, 7). The termination was based on what happened after the notice of suspension when in Mr. Kitamura's opinion Grievant still did not perform in regard to orders given as to duties (Tr.II 9).

While not a cause listed for the suspension or termination, the question of who was responsible for the inoperability of the filtration system at Kapaa Pool was introduced. On cross examination Wilson Miyashiro was asked whether Grievant was the person responsible for the

inoperability of the filtration system. Mr. Miyashiro's answer was that he did not accuse him. The relevancy of this line of questioning was the Union's assertion that Grievant was made a scapegoat for the closed Kapaa Pool and the unstated reason for termination was the broken filtration system. Mr. Miyashiro did testify that in his opinion the filtration system's condition was due to the operational manual not being followed and that whoever was operating the system would be primarily responsible. For Kapaa Pool, Grievant was the only one assigned to the pool (Tr.I 135, 136, 137). Mr. Miyashiro further testified that on Sunday the pools are vacuumed and then the filtration systems are backwashed so that the vacuumed particles are ejected from the system. On occasion, it was discovered that particles were returning to the pool which indicated that the operational

manual was not being followed. This problem only existed at Kapaa Pool during Grievant's tenure (Tr.I 158, 159, 160).

DISCUSSION

The County's position as stated in its Post-Hearing Brief is that Grievant was given clear and reasonable work instructions which he understood. The performance of work was substandard in both quality and quantity. He was reprimanded, and when the reprimands failed to improve the performance, suspension was imposed with a warning that further substandard performance would result in more severe discipline. The substandard performance continued, and Grievant was terminated from employment. Insubordination, the reason for termination, need not be a clear and unequivocal refusal to carry out

assignments but may be the "lack of cooperation and a generally disaffected attitude toward authority" citing School District #8 vs Superior Court, 102 Arizona 478, 480, 433 P. 2d. 28, 30 (1967) and Muldrow vs Board of Public Instruction, 189 So. 2d 414 (Fla. App. 1966) as authority. Because the pool was inoperative and Grievant's sole job was to maintain the grounds and facilities, Grievant could have and should have so maintained within the hours he claimed to have so worked. The failure to maintain and to comply with instructions was insubordination both as to the suspension and the termination.

The Union's position as stated in its Post Arbitration and Reply Brief is thta there was no just cause for termination in that:

1. Grievant was not insubordinate;

2. He received disparate treatment in discipline;

3. Orders were not lawful for his class specifications and his job description did not provide for manual labor as assigned;

4. Progressive discipline was not applied in that he was terminated only eight calendar days after completion of suspension and only six working days from the date the notice of suspension was given.

The Union in its post arbitration brief cited Elk Roofing Co. 56 LA 256, 258 (1971) for its definition of insubordination which was:

> "A refusal to obey some order which a supervisor is entitled to give and have obeyed, and a wilful disregard of express or implied directions of an employer."

Using this definition, Union contends that the County could not order the cleaning of yard, restrooms and showers, because this

manual labor was not within Grievant's Position Description and Class Specification, and thus, there could be no insubordination to an order that could not be given. Further, to be insubordinate, there must be a wilful disregard of an order, which Grievant did not do. Instead Grievant did work, however inadequate his performance may have been.

To the Union's contention that Grievant could not be ordered to clean the yard, restrooms and showers because this work was not within Grievant's Position Description and Class Specifications (County Exs. A and B), it is noted that both Exhibits specifically state that the employee would be "providing attendant and housekeeping services". Also at the time of hiring Grievant was issued the Standard Operation Procedures Kapaa Swimming Pool (County Ex. C) which was then reviewed item by item by Grievant and his

supervisor Isaac Hookano. This manual outlined the duties at the pool which included maintenance of showers and restrooms. Paragraph VI is entitled Yard and General Maintenance and Subparagraph 1 thereof provides that mowing will be done every other week, and Subparagraph 4 provides that daily maintenance will be performed during the course of the day whenever usage is minimal with the following priorities:

"a. Pool, which includes everything within the confines of the retaining wall.

b. Restrooms, which includes showers, footbaths, toilets, urinals, basins, tile walls and floors, etc.

c. Pump Room, which will include valves, chlorinator, filtration

system, overflow sump, intake/pump, sump, switches, mixing tank, etc.

d. Yard, which will include bleachers, fence, gates, etc."

From the Subparagraph 4 the County could order the performance of work listed in the above quoted priorities.

As to the question whether Grievant's conduct was insubordinate, this presents a more difficult question. Grievant's daily station logs which were in his handwriting and certified to be true and correct, reveal that in the ten working days before his suspension, Grievant spent 53 hours weeding and 26 hours scrubbing the restrooms. The Kapaa Pool has a grass area that would be equivalent to the grass area of two residential homes. The beds to be weeded were approximately 1,000 square feet or equivalent to two large

garden areas. Considering the size of these areas there is no questions that the yard and bleacher area could have been weeded and cut in the 53 hours of work and the restrooms cleaned in the 26 hours. Yet, the photographs introduced into evidence clearly show the failure to do the jobs as ordered. From the above, one can only conclude that Grievant was either inept or loafing. However, Grievant was not disciplined for either of these, instead he was suspended and terminated for insubordination.

The more usual forms of insubordination involve a confrontation with an express refusal to comply or selective compliance either as to orders or as to supervisors. However, insubordination may take the form of a stated intention to comply but with noncompliance over a period of time being of such magnitude, a wilful disregard of

the work order or a persistent refusal to obey a legitimate order can be imputed. The two cases cited by the County are to this effect in that the "lack of cooperation and a generally disaffected attitude" were found to be insubordination. These variations of insubordinate conduct are not inconsistent with the commonly accepted definition of Insubordination which is: "Not submitting to authority".

For this Grievance, the County has the burden of proving that Grievant's failure to do the work as in wilful disregard of an order or was a persistent refusal to obey a legitimate order, and thus not submitting to authority or insubordination. While the County has clearly sustained the burden of proving that Grievant could have and should have completed the work ordered within the time specified, the critical question is

whether there was the "lack of cooperation and generally disaffected attitude" of such magnitude as to constitute insubordination. The actions of an employee to be of such magnitude that wilfulness can be imputed without a stated refusal to comply are aptly expressed in the everyday expression: "Actions speak louder than words".

From the facts, Grievant's actions spoke louder than words, and his conduct showed a wilful disregard to work orders and a persistent refusal to obey legitimate orders. On September 16, 1983, Grievant was ordered to remove weeds under the bleachers and to scrub the walls of the ladies restrooms by September 20, 1983. Grievant's superior Wilson Miyashiro physically demonstrated how to do the work. On September 20th, four work days after the order, the Superintendent of Parks and Recreation Gordon Shibao and

Wilson Miyashiro went to Kapaa Pool to check the progress of Grievant's work. The work was not completed and upon being asked how much longer it would take to complete the work, Grievant said maybe two days. On September 21st and 24th, the Grievant's next two working days, Mr. Miyashiro checked the work progress. Because the work was not completed, Grievant was given a three day suspension (October 1, 2 and 3, 1983). Photographs of the incomplete work were taken on September 27, 1983 (County Exs. I and J and Union Exs. 1, 2, 3 and 4).

It is clear that Grievant understood the orders given, had set his own completion time and knew that his supervisors would check his work on an almost daily basis. The maximum completion time for weeding the beds under the bleachers was two days, Grievant did not complete this weeding in six days of

work. This conduct clearly indicates that Grievant wilfully chose to disregard the orders and manifested his persistent refusal to submit to authority by not doing in six work days what he could have easily done in two days.

In the notice of suspension, Grievant was warned that further insubordination and failure to perform satisfactorily would result in more severe disciplinary action. With his prior suspensions, this was a loud and clear warning that further unsatisfactory performance could result in discharge.

On September 26, 1983, Grievant was told to stop weeding because of the unsatisfactory progress and was ordered to scrub the ladies restroom. Grievant spent a half day on the 26th and full days on the 27th and 28th of September doing this work. Returning from suspension, Grievant resumed scrubbing the ladies restroom on

October 8th. On the morning of October 9th, Grievant was told to report to the County Engineer's office on October 11th. Grievant's work in scrubbing the ladies' restroom in two full days and two half days was so unsatisfactory that he was terminated effective November 1, 1983. Again, it is clear that Grievant's conduct indicated that he wilfully chose to submit to authority by not doing the work he could have easily done.

Reviewing the hours spent in weeding and scrubbing (pages 11 through 13 of this Award) unquestionably there was loafing on the job. When viewed with the warnings and almost daily checks on progress, there emerges the element of defiance to authority and a persistent refusal to obey legitimate orders. Grievant's defiance was not an open confrontation and refusal. Instead, Grievant disregarded the orders by doing only some of the work ordered and

this in an unsatisfactory manner. Grievant's actions spoke louder than any words. By not doing the work he could have easily done, Grievant was not only loafing but was also defying the authority of his superiors by persistently and wilfully disregarding their orders.

As to the issue of Grievant not having a lawn mower to cut the grass, the Arbitrator notes that the photographs introduced into evidence show tht in the yard areas, the tall grass and weeds were next to the fence, wall, bleachers and pole. These weeds could not be cut by a lawn mower and would need a sickle or machete to be trimmed.

As to the Unions contention of disparate treatment in that Sid Kini was not disciplined when he did not complete the cleaning of the men's shower room, but that Grievant was terminated when he did not satisfactorily clean the women's

restroom, from the testimony and the record, the claim of disparate treatment cannot be sustained. Mr. Kini was assigned to the swimming pool itself to make it operable which he apparently did. The order to clean the men's shower was an isolated and incidental one, whereas Grievant was ordered to devote his sole working time to the primary duty of weeding and cleaning the women's restrooms. The suspension and termination went to Grievant's failure to carry out these orders.

As to whether progressive discipline was applied by the County, the Union contends that a termination eight days after the suspension is proof in itself that progressive discipline was not applied. As contended on page 15 of the Post Arbitration Brief the Union argues:

> "In the instant case Caldeira was not progressively disciplined. Only eight days after his suspension, Caldeira was terminated. This is an

> unreasonable time to expect Caldeira to improve his behavior. The shortness of time indicates the suspension was just a pretext to mask the intent to terminate Caldeira from the outset."

The Arbitrator notes that progressive or corrective discipline is not mandated in the Labor Agreement or in the Hawaii Public Employment Laws. Elkouri and Elkouri, "How Arbitration Works", at page 630 states that it is axiomatic that the degree of penalty should be in keeping with the seriousness of the offense. Arbitrator Whitley P. McCoy is quoted as follows:

> "Offenses are of two general classes: (1) those extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline; (2) those less serious infractions of plant rules or of proper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc., which call not for discharge for the first offense (and usually

not even for the second or third offense) but for some milder penalty aimed at correction." (underscoring added)

Further, it is pointed out that there is considerable diversity of arbitral thought in respec to progressive or corrective discipline. Elkouri and Elkouri, infra, at page 631 lists some of these various views:

"1. There are cases in which management was held obligated to use corrective discipline although there was no indication that management had ever approved its use either by the agreement or by unilaterally instituting corrective discipline in the past.

2. It has been said that the formalization of a corrective discipline program is a matter for negotiations by the parties, not for the arbitrator. It also has been said that it "is one thing to determine whether or not a contract permits discharging an employee under given circumstances," but that it "is entirely another matter for an arbitrator to conclude that an employee's discharge

violated a contract because of something not in the contract," that is, because of the absence of a corrective discipline program where none is specified by the agreement.

3. There are cases in which discharge was upset where the company had a corrective discipline system but failed to abide by it.

4. Where an employer was reluctant to suspend the employee and used counselling and warnings instead (as predischarge measures), this demonstrated a desire to help rather than hurt the employee, an arbitrator said, for which the employer should not be criticized.

5. Where there were "no circumstances to suggest that corrective discipline would rehabilitate the grievant into a satisfactoryemployee," discharge without corrective discipline was upheld.

6. In adopting a corrective discipline program a company was held not to have surrendered its right to invoke summary discharge for serious offenses warranting such action.

> Also, the mere fact that an agreement specified the use of corrective discipline for some offenses did not necessarily mean that it must be used for all offenses.
>
> 7. In sustaining discharge, arbitrators sometimes have stressed the fact that corrective discipline had been used without avail."

As discussed on pages 23 and 24 of this Award, Grievant's actions were wilful disregard of orders or were persistent refusals to obey legitimate orders. As such, the underscored part of the quote from Elkouri and Elkouri is authority that Grievant could have been summarily discharged, and that corrective or progressive discipline need not have been used. As to corrective or progressive discipline, the testimony of County Engineer Lawrence Kitamura is revealing.

He testified" "I saw the pool condition and I was wondering what...transpired in regard to the pool

condition, itself, because I seen some of the actions that was being taken by the parks and recreation in regard to Caldeira. Maintenance of the pool. And, in my opinion, in comparison with the other pools that we maintain, that Kapaa pool was in a dilapidated condition and...and lack of maintenance, basically. Well, when I went there it was the pool was out of service for quite sometime because of breaking down of the chlorinator system. And when I went to check there were weeds all over the place, weeds under the bleachers, weeds coming out of the concrete, weeds in the front section. There's also the pool area. The bathrooms was dirty and required maintenance on them. Just seems like work hadn't been done on it or very minimal amount of work was performed on the pool, itself, in regard to maintenance (Tr.II 6)."

Mr. Kitamura then testified that with the prior disciplinary record, he could have terminated Grievant instead of suspending him on September 26, 1983, but since the disciplines were imposed prior to his tenure in office, he decided, "...to give Caldeira the chance to prove to myself that he can perform the work, we took the step disciplinary action instead of going directly into termination (Tr.II 7)."

Mr. Kitamura futher testified that the subsequent termination was not based upon the suspension, "...but in further actions, in other words, in regard to his orders that was given him by his supervisors. He still did not perform in regard to his duties, and therefore, which led up to the termination of Mr. Caldeira."

Thus, even though the County could have summarily discharged Grievant on

September 26, 1983, it chose to give Grievant another chance to correct his work and to submit to authority. But, when the same behavior persisted, termination was ordered. The fact that there were only 15 days between the notice of suspension and the notice of termination does not flaw the termination. When an Employer has a right to summarily discharge, it is for the Employer to determine at what point corrective discipline is not effective, and with the same offense continuing, to terminate.

The Arbitrator is not empowered to award reinstatement based on his substituted judgment that he would have allowed more than 15 days for Grievant to rehabilitate himself. The Arbitrator can only make awards based on whether there was "just cause" for the suspension and a "just cause" for termination.

As a cross check to whether the suspension and then the discharge were just and proper, the Arbitrator used the definition "just cause" found in Robert's Dictionary of Industrial Relations, Bureau of National Affairs, Washington, D.C. 1971.

The definition provides in part:

> "Professor Carroll R. Daugherty has suggested seven test questions for determining 'just cause' for discipline. Daugherty maintains that a "no" answer to any of the following questions would normally indicate that just cause for discipline did not exist. His test questions are:
>
> (1) Was the employee given advance warnings of the possible or probable disciplinary consequences

of his conduct?

(2) Was the rule or order reasonably related to the efficient and safe operation of the business?

(3) Before administering discipline, did the employer make an effort to discover whether the employee did in fact, violate a rule or order or management?

(4) Was the employer's investigation conducted fairly and objectively?

(5) Did the investigation produce substantial evidence or proof that the employee was guilty as charged?

(6) Had the company applied its rules, orders and penalties

without discrimination?

(7) Was the degree of discipline administered in the particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the employee's record of company service?" (underscoring added)

Answers to the above quoted seven tests as to the 3 day suspension of September 26, 1983 and the discharge of October 17, 1983 are Yes.

In brief, the facts show that when the swimming pool at Kapaa became inoperable in April of 1983, and up to the suspension of September 26, 1983, Grievant's sole duty was to maintain the yard and restroom areas. (Philip Kekahu and Sid Kini were temporarily assigned to Kapaa Pool to assist the contractor in

making the pool operable.) In September of 1983, the condition of the yard and restrooms were such that the County Engineer, the Superintendent of Parks and Recreation and the Director of Recreation ordered Grievant to do the job he should have done in the prior five months. Grievant was given numerous warnings as to his performance and then given specific orders to complete the cleaning and maintenance on a date certain. Grievant failed to complete the work which a worker should have easily done. With the suspension came another warning and a specific order narrowing the scope of work to cleaning the ladies restroom by October 5, 1983. Grievant again failed to do the work as ordered.

The repeated orders by County officials to clean these areas were nothing more than ordering Grievant to do his job. The photographs introduced into

evidence clearly show that Grievant did not do his job.

With the Kapaa swimming pool being inoperable, of the four items in the above quoted Paragraph VI, Subparagraph 4 of the Standard Operation Procedures (pages 20 and 21 of this Award) only two were assigned to Grievant on a daily job basis. This would indicate that what was ordered was not unreasonable or burdensome. Further, the organization chart on page 10 of this Award indicates that there were two other County pools in Kekaha and Waimea, and the testimony was that these pools were adequately maintained by sole employees.

From the facts and with the quotes of arbitral authorities, on September 26, 1983, the County could have summarily discharged Grievant for persistent refusal to obey legitimate orders, but instead gave Grievant an opportunity to comply by

October 5, 1983. When the work was again not completed, he was discharged effective November 1, 1983.

For the reasons discussed above, the Arbitrator finds that the suspension issued on September 26, 1983, was for proper and just cause. The Arbitrator further finds that as to termination, the County has sustained its burden of proof and the discharge issued on October 17, 1983 effective November 1, 1983 was for proper and just cause.

The Arbitrator has no authority to exercise leniency or clemency. The Labor Agreement governing this Grievance specifically restricts the Arbitrator to finding whether the suspension and the discharge were proper or improper. Only with a finding that the suspension or the discharge was improper may the Arbitrator set aside, reduce or modify the actions. Having found the actions of the County to

be proper, there can be no modification of the suspension and of the discharge.

AWARD

The Grievance of Ronald Caldeira as to suspension is denied. The Grievance of Ronald Caldeira as to discharge is denied.

DATED: Honolulu, Hawaii, this 15th day of January, 1985.

STANLEY LING
Arbitrator

STATE OF HAWAII)
) SS
CITY AND COUNTY OF HONOLULU)

On this 15th day of January, 1985, before me personally appeared STANLEY LING, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

_____

Notary Public
First Judicial Circuit
State of Hawaii

My commmission expires: _____

CERTIFICATE OF SERVICE

I hereby certify that copies hereof were served upon the following persons by mailing the same to them at the following addresses on January 15, 1985.

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_____

Stanley Ling
Arbitrator

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

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DEPARTMENT OF PUBLIC WORKS, COUNTY OF KAUAI, Plaintiffs, -versus- HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, AFSCME 152, Defendants.	SPECIAL PROCEEDING NUMBER 87-0017

TRANSCRIPT OF PROCEEDINGS

held before The Honorable Kei Hirano, Judge, presiding on Friday, September 25, 1987.

REPORTED BY:

FARINCEE BOYKIN, C.S.R. NO. 106
OFFICIAL COURT REPORTER
STATE OF HAWAII, COUNTY OF KAUAI

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I N D E X

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(The clerk called the case.)

THE COURT: Good afternoon.

MR. PERRY: Warren C.R. Perry, on behalf of the Movant, County of Kauai.

MR. KHIM: Good afternoon, Your Honor; Charles K.Y. Khim, K-H-I-M, for the Defendant, Hawaii Government Employees Association.

MR. SMITH: Robert Smith, for Grievant, Ronald Caldeira.

THE COURT: Proceed, Mr. Perry.

MR. PERRY: Your Honor, as was stated Memorandum attached to the Motion, this action right now is just purely to confirm an Arbitrator's Award that was rendered pursuant to a Collective Bargaining Agreement, and under Chapter 658, and be confirmed by this Court. And at this time that is exactly what the County --

THE COURT: Mr. Perry, do you have any response to the Grievant's memo where they cite 658-8, stating that Motion for

Confirmation be filed within one year after the award is made?

MR. PERRY: Yes.

There are judicial precedence and, I think, it's well-settled law that there is a tolling of the Statute of Limitations, any Statute of Limitations, during the pendency of any sort of an appeal taken to challenge an action.

And, at this time, with Mr. Caldeira's pending challenge in the Hawaii Public Employees Board, and, I guess, ancillary challenge in the U.S. Federal District Court, that the period for confirmation be one year limitation as a toll.

Another thing, at least the Hawaii Court of Appeals has stated that one of the grounds where you cannot confirm is when there is no finality, and here we have the Arbitrator's Award, Mr. Ling's award, basically, de facto, final,

definite, and all the County of Kauai right now is asking is for de jour, validation of the award.

I'd like to point out to you the case of Meyers versus The County of Orange, and this is at 6 California App. 3rd, 971, which stands for the proposition that Statute of Limitations is tolled during the period when exhausting administrative remedies or in other ways challenging the action.

THE COURT: Mr. Khim, would you like to go first?

MR. KHIM: Thank you, Your Honor.

As you well know the HGEA lost the arbitration, and we disagree with the Arbitrator's decision. However, under the Statute, we have no recourse to vacate the arbitrator's award except if it fits between one of four narrow grounds. And while we think the Arbitrator was wrong I, at this time, have no evidence of any one

of those four grounds, so I have no ground to challenge the confirmation, Your Honor. And that's why the Union bargains for arbitration to have it final and binding.

Obviously, in any kind of litigation one side is not going to like the answer that the judge or the arbitrator gives. And we didn't like the answer of Arbitrator Ling. We thought he was wrong. But arbitration is final and we will live up to our end of the bargain in the Collective Bargaining Agreement saying the arbitration is final and binding.

If I might address the issue of Statute of Limitations, Your Honor, and the argument raised by Mr. Smith.

It's a well-recognized rule that pending an administrative proceeding the Statute of Limitations is tolled, and it's found in AmJur, Limitation of Actions, as well as the Hawaii Supreme Court has so ruled in the McHenry versus McHenry case

which is found at 37 Hawaii 223, 1945. In that case there was a prior state court action that was improperly filed and dismissed on that ground, and, nevertheless, in a subsequent state action the limitation period was tolled for the subsequent action.

And, while not exactly on the facts of this case, because it was a divorce action and they were talking about the old six-month waiting period rule, nevertheless, the proposition stands for the fact tha while there is a prior proceeding during which the parties are litigating the same issue, or the same -- basically, the same cause of action, that the Statute of Limitations is tolled for subsequent proceedings.

And I have also run across the case that Mr. Perry has cited, and that case stands, also, for the proposition that even if the exhaustion of administrative

remedies is not absolutely warranted that so long as there is another administrative proceeding being pursued, even though you don't have to exhaust that administrative proceeding before going into court, the Statute of Limitations will be tolled. That's my understanding of the prevailing rule of law. That's certainly the rule of law in California.

And, if I might go into the rationale behind such decisions, the Statute of Limitations is meant to bar actions where a party has not been bothered about it for many years and is entitled to be free of it because nobody has made any issue of it. However, when the action is disputed, be it in a court or an administrative agency the party is not entitled to say of the law I can be free of it because nobody is making a big deal about it. That is the doctrine behind the tolling of the Statute of Limitations. And I think it's

applicable herein.

In this case the Movant has been vigorously litigating this case against both the HGEA and the County of Kauai, and, certainly, he has not allowed the issue to drop.

And, if I might add, the clean hands doctrine would also prohibit him from coming into this court and saying that he should be entitled to be relieved of any kind of litigation based on this suit when he, in fact, has been vigorously pursuing it, not only in front of the Federal Court, Your Honor, but before the Hawaii Labor Relations Board.

Thank you, Your Honor.

THE COURT: Mr. Smith?

MR. SMITH: Your Honor, as the Court understands from our Memorandum, this case here comes about because Mr. Caldeiro, in Federal Court, has a 1983 Civil Rights action on file, alleging a long-standing

conspiracy concerning his discharge, going back over the whole five years of his employment with the County.

Nobody sought confirmation or a vacation of the Arbitration Award, so for some two and a half years all that's happened is the Federal Court litigation. There's nothing concerning the Arbitration award in this Court.

Now, with two weeks to go before we're scheduled to jury trial in the Federal Court, there's a motion made to have Judge Fong defer to arbitration proceedings or to not proceed with the Federal Court case because it's alleged the aribtration has a preclusive effect as res judicata on the parties.

I cite the McDonald case, a 1984 U.S. Supreme Court case, holding that there is no preclusive effect when the arbitration award has not been judicially reviewed. That makes these parties come into court

now and try to join together in a motion to knock out the Federal Court case. I think the Court should enforce the one year period.

I'm not familiar with the cases cited by Counsel, but if the Court has any doubt about that I'd like time to brief those cases. I would suggest to the Court whether or not the one year period can be tolled because there are administrative proceedings pending, there still is going to be terrible latches on the part of the County here in seeking confirmation of the award.

So, th Court disturb the track that the Federal case is going on.

THE COURT: Mr. Perry?

MR. PERRY: One final thing I would like to add besides what I have said.

I don't think what Mr. Smith has stated disputes the rationale the County has provided so far. You've got to

remember that there is no prejudice to the Grievant for confirming this award. And there is a definite need for finality, and the need to preserve judicial economy and preventing vexatious and continuing litigation.

And that is the whole substance of this motion right now, to have some sort of validation of the finality of the award, and we can proceed on that.

Thank you.

THE COURT: Counsel, I've heard your arguments, I've looked at your respective memos, and the Court does agree with the County of Kauai that the Statute has been tolled, and, accordingly, the Motion to Confirm is granted.

MR. SMITH: Well, Your Honor, may I now inquire? I assume that the one year period might bar any attempt to confirm the award. If that is not the case, then the question is whether the award should

be confirmed on the merits. That has not been addressed. And, in that event, I'm going to need to know from the Court whether I'm entitled to time to prepare, time to submit the whole record, which is 800 pages of documents in the whole history of the employement, do I have a right to discovery; all of those things. The question is whether there's a basis for confirmation. That's the question.

MR. KHIM: Your Honor, may I address that issue.

The Statute is very clear, Your Honor. The Statute is mandatory. The Statute says:

The Arbitrator's Award shall be confirmed unless one of the four grounds exists.

None of those four grounds have been raised, Your Honor.

MR. SMITH: But, Your Honor, --

MR. KHIM: The Statute is further clear on exactly what is necessary to put in. And I'm sure you are as well aware of these things. All you need is exactly what Mr. Perry put in his Motion.

THE COURT: That's right; and the Motion is granted in that fashion.

MR. SMITH: Well, Your Honor, would I not have --

THE COURT: You take whatever steps you want, Mr. Smith.

MR. SMITH: -- to submit a Motion to Vacate the Award on the same basis. If they can come in here and --

THE COURT: You do what you want. The Motion is granted.

Mr. Perry, will you prepare the Order.

MR. PERRY: I will, Your Honor.

(The hearing was adjourned at 1:20 P.M.)

---oo0oo---

STATE OF HAWAII)
: S.S.:
COUNTY OF KAUAI)

I, FARINCEE BOYKIN, the Official Court Reporter in and for the State of Hawaii, County of Kauai, do hereby certify that the foregoing pages, 1 through 12, inclusive, comprise a full and correct transcript of the proceedings had in connection with the above-entitled cause.

DATED: September 26, 1987, at Lihue, Kauai, Hawaii.

FARINCEE BOYKIN, C.S.R. NO. 106
OFFICIAL COURT REPORTER
NOTARY PUBLIC, STATE OF HAWAII

My commission expires 10-14-88

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IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

DEPARTMENT OF PUBLIC WORKS, COUNTY OF KAUAI Plaintiff, vs. HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION AFSCME 152, Defendant.	S.P. NO. 87-0017 ORDER CONFIRMING ARBITRATION AWARD

ORDER CONFIRMING ARBITRATION AWARD

Plaintiff's Motion to Confirm Arbitration Award came to be heard by this Court on September 25, 1987. Upon receiving argument by counsel, and reviewing the records and files herein,

the Court found as follows:

1. Plaintiff and Defendant, on March 30, 1984, entered into a collective bargaining agreement (CBA) which provided for, inter alia, the final resolution of disputes arising under CBA through the process of arbitration.

2. On January 15, 1985, Arbitrator Stanley Ling rendered the subject Arbitration Award as a means of resolving finally a CBA grievance between Plaintiff and Defendant.

3. On or about April 4, 1985, Grievant filed a complaint against Plaintiff, Defendant and Arbitrator Ling in the State of Hawaii administrative agency now known as the Hawaii Labor Relations Board, seeking, inter alia, the vacating of the Award.

4. The Hawaii Labor Relations Board has not held a hearing on the substantive allegations of said complaint, and

therefore has not rendered a final decision thereon.

Based on such findings, as well as argument of counsel and the records and files herein, the Court made the following legal conclusions:

1. Plaintiff filed this action pursuant to Chapter 658, Hawaii Revised Statutes (H.R.S.) and complied with all applicable procedural requirements set forth therein.

2. Arbitrator Ling entered the subject Award pursuant to his authority under CBA, and the Award is not subject to challenge under Sections 658-9 and -10, H.R.S.

3. Pursuit by Grievant of his administrative and federal claims which challenge, inter alia, the validity of the subject Award, has tolled the one-year limitation period of Section 658-8, H.R.S.

NOW, THEREFORE, it is hereby the decision of this Court and thereby this Court so orders, that the subject arbitration award be and is confirmed, and that this Order shall constitute the entry of judgment pursuant to Section 658-12, H.R.S.

DATED: SEPTEMBER 25, 1987

Judge of the Above-Entitled Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RONALD CALDEIRA,	)	CIVIL NO. 85-0869
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
COUNTY OF KAUAI, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND TO DISMISS

Defendant's motion to dismiss or in the alternative for summary judgment was heard by the court on September 28, 1987. Robert A. Smith appeared for plaintiff Ronald Caldeira, Charles K.Y. Khim appeared for defendant Hawaii Government Employee's Association (HGEA) et al., and Warren C.R. Perry appeared for defendant County of Kauai et al. The court having considered the materials on file and the arguments of counsel finds as follows.

I. BACKGROUND.

A. Parties

Plaintiff Ronald Caldeira brings this suit under 43 U.S.C. sections 1983 and 1985. Plaintiff sues as defendants the County of Kauai and present or former employees of the County of Kauai, Eduardo Malapit, Tony Kunimura, Henry Morita, Laurence Kitamura, Gordon Shibao, Wilson Miyashiro, Isaac Hookano, Phillip [sic] Kekahu, and Sid Kini (hereinafter referred to collectively as "defendant County") under 42 U.S.C. section 1983. Plaintiff sues his former union Hawaii Government Employee's Association (HGEA) and its members (hereinafter referred to collectively as "defendant HGEA") as co-conspirators with defendant County under 42 U.S.C. section 1985(3).

B. Facts.

Plaintiff Ronald Caldeira was hired as a lifeguard by defendant County in

1978. The plaintiff held this position from 1978 until November 1, 1983, when he was discharged by defendant County. The plaintiff alleges that beginning in late 1978 or early 1979, defendant County developed and engaged in a conspiracy to effect his discharge without just cause. The plaintiff also alleges that defendant HGEA joined in this conspiracy with defendant County beginning in June, 1980.

More specifically, the plaintiff's alleges twelve "episodes" of alleged wrongoing by the defendants designed to effect his discharge. The plaintiff contends that these "episodes" caused his discharge, which in turn constitutes the deprivation of his constitutional rights substantiating his sections 1983 and 1985 causes of action.

The court approaches the disposition of the defendant's motion in terms of the alleged twelve "episodes". "Episodes" one

through ten involve alleged wrongdoing by defendant County to develop a negative work record and hostile work environment for the plaintiff to effect his eventual discharge. "Episodes" three through ten also involve alleged wrongdoing by defendant HGEA, in which the plaintiff claims it conspired with defendant County by acquiescing in the scheme to effect his discharge by failing to represent him adequately and thereby prevent the development of his negative work record and hostile work environment.

"Episode" eleven is the crux of the plaintiff's section 1983 claims against defendant County. It involves incidents occuring during the pool's closing in 1983, when the plaintiff was ordered to do some yard and janitorial work. The plaintiff considered a demotion in his work status. The plaintiff disobeyed these work orders. The plaintiff was

suspended and discharged by defendant County, after which defendant HGEA invoked the arbitration procedure and represented the plaintiff therein.

"Episode" twelve involves the alleged wrongdoing of the defendants to distort and misrepresent the record presented to the arbitrator to prevent the plaintiff from having a fair hearing and thereby recover his job.

On January 15, 1985, the arbitrator found that the work orders were proper, the plaintiff was insubordinate, and defendant County had just and proper cause to dismiss the plaintiff. On July 16, 1985, the plaintiff filed this action in the federal district court. On September 25, 1987, a Hawaii state court affirmed the arbitration decision.

II. DISCUSSION

The plaintiff's causes of action under 42 U.S.C. sections 1983 and 1985 center

around his discharge by defendant County, i.e., "episode" eleven. The court therefore addresses first the efficacy of "episode" eleven as substantiating his causes of action. The court then turns to a discussion of "episodes" one through ten as possible substantiation, followed by a discussion of "episode" twelve.

A. "Episode" Eleven.

It is well settled that 28 U.S.C. section 1738 requires federal courts to give an administrative adjudication reviewed by a state court the same full faith and credit the adjudication would enjoy in the state's own courts. Mack v. South Bay Beer Distrib., Inc., 798 F.2d 1279, 1283 (9th Cir. 1986) (citing Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 [1985]; McDonald v. City of West Branch, 466 U.S. 284 [1984]). In this case, a Hawaii state court has affirmed the arbitration decision, which

found that the plaintiff was discharged for just and proper cause arising from "episode" eleven. The state's affirmation of the arbitration decision constitutes an entry of judgment under Hawaii Rev. Stat. section 658-12, which has a binding res judicata and collateral estoppel effect on other Hawaii courts. Santos v. State, Dept. of Transp., Kauai Div., 64 Haw. 648, 646 P.2d 962 (1982).

Under the rule set forth in Mack, then, the court must give the state court affirmation of the arbitration decision full faith and credit under 28 U.S.C. section 1738. Specifically, the court must accept as given that the plaintiff was discharged for just and proper cause, and that the plaintiff's alleged constitutional deprivation or injury, being the discharge, was self-inflicted by his insubordination in the face of a valid work order by defendant County.

Accordingly, "episode" eleven cannot substantiate the plaintiff's section 1983 claims against the defendants.

B. "Episodes" One Through Ten.

Once the linchpin of the plaintiff's sections 1983 and 1985 causes of action has been removed, i.e., "episode" eleven, the court must inquire whether "episodes" one through ten can substantiate his sections 1983 and 1985 causes of action. To determine this the court must examine whether these "episodes" satisfy the causation requirement inherent in all sections 1983 and 1985 causes of action.

Causation is an essential element of every section 1983 and section 1985 cause of action. Arnold v. IBM, 637 F.2d 1350, 1355 (9th Cir. 1981). In a section 1983 action, the plaintiff must show the defendant caused a deprivation of his constitutional rights. Id. In a section 1985 action, the plaintiff must show that

acts done in furtherance of a conspiracy by defendant caused the plaintiff's injury. Id. Furthermore, the causation requirement of sections 1983 and 1985 is not merely cause in fact, but proximate cause or legal causation. Id.

The court finds that the plaintiff has failed to satisfy the causation requirement for his sections 1983 and 1985 causes of action. To satisfy the requirement, the plaintiff must show a causal connection between the defendant's alleged wrongful action and the alleged deprivation. See Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986) (citing Arnold, 637 F.2d at 1355-56); see also Lossman v. Pekarske, 707 F.2d 288, 291 (7th Cir. 1983); Reimer v. Smith, 663 F.2d 1316 & n.4 (5th Cir. 1981). The alleged deprivation the plaintiff, as pled in the complaint, was discharged from his employment with defendant County in

violation of the collective bargaining agreement. The alleged wrongdoing of the defendants, as evidenced by the the first ten "episodes," is at best the development of a negative work record and hostile work environment to effect his discharge. The discharge, however, was not caused by the alleged wrongdoing of the defendants of the first ten "episodes," the discharge was caused by the insubordination of the plaintiff in the face of a proper work order, as found by the arbitration and confirmed by the state court. This court is bound to accept this causal connection as fact under Mack. The alleged wrongdoing of the defendants, then, was neither the cause in fact nor proximate cause of the plaintiff's deprivation.

Even if the court were to allow that these "episodes" were in some way the cause in fact of the plaintiff's deprivation, the court cannot see how

these "episodes" qualify as the proximate cause of his deprivation. As stated before, the plaintiff was insubordinate in the face of a valid work order. To use the language of tort law, cf. Martinez v. California, 444 U.S. 277, 285 (1980); Carey v. Piphus, 435 U.S. 247, 257-58 (1978); Arnold, 637 F.2d at 1355; Lossman, 707 F.2d at 291; Reimer, 663 F.2d at 1322 n.4, this insubordination was at least a superceding intervening cause if not the actual and sole proximate cause of his deprivation.

Accordingly, "episodes" one through ten cannot substantiate the plaintiff's section 1983 and 1985 causes of action.

C. "Episode" Twelve.

The plaintiff attempts to substantiate his section 1985 claim against the county by alleging that defendant HGEA conspired with defendant County to effect plaintiff's discharge by

allowing the presentation of a distorted and incomplete record to be heard in the arbitration proceeding.

To succeed in a section 1985 cause of action the plaintiff must show: (1) a conspiracy, (2) to deprive any person or class of persons of equal protection of the laws or equal privileges and immunities under the laws, (3) an act done in furtherance of the conspiracy, and (4) personal injury, property damage or a deprivation of any right or privilege of a citizen of the United States. See Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971). Furthermore, the plaintiff must state facts with some degree of particularity that the defendants' participation or overt acts in the alleged conspiracy were the proximate or legal cause of his injury. Hewitt v. Grabicki, 596 F. Supp. 297, 304 (E.D. Wash. 1984) (citing Arnold).

The court examines the causation requirement first. The plaintiff alleges that the defendant HGEA failed to present a complete record of the negative work record and hostile work environment developed by defendant County to effect his discharge. This comprises events described above as "episodes" one through ten. The discussion above, however, has determined under a causation analysis that "episodes" one through ten cannot substantiate the plaintiff's sections 1983 and 1985 causes of action. Thus, the failure to present a record of these "episodes" is not relevant and the plaintiff does not satisfy the causation requirement.

Regarding the Griffin deprivation requirement, the discussion above has determined that defendant County did not deprive the plaintiff of his constitutional rights. Namely, the court

is bound to accept the state court's affirmation of the arbitrator's decision that the defendant discharged the plaintiff for just and proper cause. The absence of a section 1983 deprivation of constitutional rights precludes a section 1985 conspiracy claim predicated on the same allegations. Cassettari v. Nevada County, Cal., 824 F.2d 735, 739 (9th Cir. 1987) (citing Dooley v. Reiss, 736 F.2d 1392, 1395 [9th Cir.], cert. denied, 469 U.S. 1038 [1984]). Accordingly, the plaintiff has suffered no deprivation, and he therefore fails this Griffin requirement as well.

The court further analyzes the plaintiff's failure to satisfy the other Griffin requirements of a section 1985 cause of action under the standards for summary judgment. Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered

when:

> "...the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 [1986]). The moving party must be able to show the "absence of a material and triable issue of fact," Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the

opposing party will bear the burden of proof at trial, see Celotex, 106 S. Ct. at 2553. But cf. id. at 2555-56 (White, J. concurring).

If the moving party meets this burden, then the opposing party may not defeat a motion for summary judgment absent any significant probative evidence tending to support his claim. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the moving party's evidence at trial. See T.W. Elec., 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. British Airways Bd. v. Boeing Co., 585 F.2d 946, 961 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. See Eisenberg v. Insurance Co. of North America, 815 F.2d 1285, 1289 (9th Cir. 1987) (citing Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2512 [1986]). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." Eisenberg, 815 F.2d at 1289. Cf. Liberty Lobby, 106 S. Ct. at 2513 ("[T]he judge must ask not whether he thinks the evidence favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.").

When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the opposing party with respect to that fact." T.W. Elec., 809 F.2d at 631. Inferences from the facts must be drawn in the light most favorable to the opposing party. Id. Inferences may be drawn both from disputed facts that the judge is required to resolve in favor of the opposing party. Id.

Finally, an allegation of conspiracy cannot survive an adequately supported motion for summary judgment. Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983) (citations omitted); Hewitt 596 F. Supp. at 305.

Having enunciated the pertinent legal standards for summary judgment, the court now applies them to the plaintiff's

section 1985(3) claims against defendant HGEA. An essential element of the palintiff's section 1985(3) cause of action under Griffin is the existence of a conspiracy. To prove a section 1985 conspiracy between a private party and the government under section 1983, the plaintiff must show an agreement of "meeting of the minds" by the defendants to violate his constitutional rights. Fonda, 707 F.2d at 438 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 [1970]). The parties must have shared a conspiratorial objective. Id. Specifically, the plaintiff must show that defendant HGEA entered into an agreement with defendant County to violate the plaintiff's substantive due process rights during the arbitration proceeding. The plaintiff would have the burden of proving this element at trial.

Defendant HGEA submits affidavits of HGEA attorney Mr. Khim, affidavits of Arbitrator Ling, and the Post Arbitration Brief written by Mr. Khim, to show that there was no such conspiracy and that defendant HGEA fairly and zealously represented the plaintiff's interest in arbitration. The court is satisfied that the defendant as moving party has met its burden of identifying portions of materials that identify for the court "the absence of a material and triable issue of fact." See T.W. Elec., 809 F.2d at 630; Richards, 810 F.2d 902.

This finding compels the plaintiff to present significant probative evidence tending to support his legal theory of conspiracy under section 1985. Commodity Futures, 611 F.2d at 282. That the plaintiff alleges a conspiracy is insufficient to defeat an adequately supported motion for summary judgment.

Hewitt, 596 F. Supp. at 305 (citing Fonda, 707 F.2d at 438). The plaintiff must point ot some facts probative of a conspiracy between the defendants to survive summary judgment. Id. (citing Ward v. EEOC, 719 311, 314 (9th Cir. 1983), cert. denied, 466 U.S. 953 [1984]). The plaintiff has not presented the court with any direct evidence of a conspiracy between defendant HGEA and defendant County. Nor has the plaintiff presented the court with circumstantial evidence from which a fair-minded jury could draw inferences to find his favor. Instead, the plaintiff attempts to base his conspiracy allegations on essentially post hoc ergo propter hoc rationalization.

Similarly, the plaintiff has not presented any direct evidence to support the Griffin "act in furtherance of the object of the conspiracy," Griffin, 403 U.S. at 103, requirement of section 1985.

Nor has the plaintiff presented any circumstantial evidence from which a fair-minded jury could draw inferences to find in his favor regarding an act in furtherance of the alleged conspiracy.

In sum, under the Celotex and Liberty Lobby standards, as interpreted by T.W. Elec. and Eisenberg, respectively, the court does not find the plaintiff's "evidence" to survive the defendant's motion for summary judgment regarding "episode" twelve. The court concludes that the plaintiff has not presented any facts probative of a conspiracy between defendant HGEA and defendant County; i.e., that the defendants by some concerted action intended to harm the plaintiff unlawfully, which in fact did harm the plaintiff. See Doleman v. Meiji Mut. Life Ins. Co., 727 F.2d 1480, 1482 n.3 (9th Cir. 1984) (definition of civil conspiracy). The court therefore finds

that no question exists whether "reasonable minds could differ as to the import of the evidenc," Eisenberg, 815 F.2d at 1289; or whether "a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Liberty Lobby, 106 S. Ct. at 2513. Accordingly, this court grants the defendants' motion for summary judgment regarding the plaintiff's section 1985(3) claim against defendant HGEA with respect to the arbitration, i.e., "episode" twelve. Cf. Ashelman v. Pope, 769 F.2d 1360, 1362 (9th Cir. 1985) (if plaintiff cannot uncover through discovery any evidence to detail and support his conspiracy theory, then a grant of summary judgment is appropriate).

III. Conclusion

The court has determined that "episode" eleven cannot support the plaintiff's sections 1983 and 1985 causes

of action, following a res judicata/collateral estoppel analysis under Mack. The court has also determined that "episodes" one through ten cannot support the plaintiff's causes of action, following a causation analysis under Arnold. Finally the court determines that "episode" twelve cannot support the plaintiff's section 1985 cause of action, following a causation analysis under Arnold, a failure of supporting section 1983 analysis under Cassettari, and/or a summary judgment analysis under T.W. Elec. and Eisenberg.

Accordingly, the defendants' motions for summary judgment against the plaintiff's sections 1983 and 1985 claims against both the County and HGEA defendants are GRANTED. There being no further claims in the complaint for trial, the plaintiff's case based on any of the twelve "episodes" is DISMISSED.

The court does not address the defendant's statute of limitations arguments, of which a recent Ninth Circuit decision easily disposes. Usher v. City of Los Angeles, No. 86-6328, --- F.2d --- (9th Cir. Sept. 21, 1987) (WESTLAW, CTA9 file). The court also does not find any merit in defendant's abstention arguments and does not discuss them.

IT IS SO ORDERED

DATED: Honolulu, Hi, OCT. 9, 1987.

UNITED STATES DISTRICT JUDGE

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

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DEPARTMENT OF PUBLIC WORKS, COUNTY OF KAUAI, Plaintiffs, -versus- HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, AFSCME 152, Defendants.	SPECIAL PROCEEDING NUMBER 87-0017

TRANSCRIPT OF PROCEEDINGS

held before The Honorable Kei Hirano, Judge, presiding on Thursday, October 15, 1987.

REPORTED BY:

FARINCEE BOYKIN, C.S.R. NO. 106
OFFICIAL COURT REPORTER
STATE OF HAWAII, COUNTY OF KAUAI

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---ooOoo---

THE COURT: Hello.

THE OPERATOR: Hello. Judge Hirano?

THE COURT: Yes.

THE OPERATOR: Do you have Warren Perry with you?

THE COURT: Yes. Yes, he is. He just walked into my Chambers.

THE OPERATOR: Okay. Let me take a short role call.

Robert Smith?

MR. SMITH: Yes; speaking.

THE OPERATOR: Charles Khim.

MR. KHIM: I'm here.

THE OPERATOR: And, Judge Hirano?

THE COURT: Here.

THE OPERATOR: All right; go ahead on your call.

THE COURT: Mr. Smith?

MR. SMITH: Yes. Hello.

THE COURT: Hello, Mr. Smith; you're on.

(No response.)

THE COURT: Can you hear me?

MR. SMITH: Yes, I hear you.

THE COURT: Okay.

MR. SMITH: Is Mr. Perry on?

THE COURT: Oh, yes; he's seated right here.

MR. SMITH: Okay.

THE COURT: Proceed.

MR. SMITH: As far as mine, I don't have anything to add to the Motion to Reconsider or the Motion to Vacate themselves, but I would want to inquire whether the Court received my Supplemental Memorandum that I sent off in the mail last Tuesday.

THE COURT: Tuesday? Let me see. I did not receive it but I just got a copy handed to me.

MR. SMITH: Okay. Well, let me briefly comment then about that, Judge.

THE COURT: Okay.

MR. SMITH: My purpose in filing that was to show Your Honor the effect of Your Honor's Decision on September 25. We were due in Court before Judge Fong on the civil rights action on the following Monday; that was September 28. At that time at nine o'clock in the morning Mr. Perry and Mr. Khim filed a copy of your Decision with Judge Fong. That was in connection with a Motion for Summary Judgment that they had filed which was then orally argued. And the argument that they made was on the (inaudible) Statute, the Federal Statute.

Judge Fong was bound by your Decision, and would not look at the Arbitration or any of the other events surrounding --

THE COURT: Mr. Smith, could you speak a little louder for us?

MR. SMITH: Pardon me?

THE COURT: Could you speak up a little louder?

MR. SMITH: Yes, I'll try.

He could not look at any of the episodes leading up to the Arbitration or the Arbitration. He had to give full faith credit to your Decision, therefore, he should dismiss the case.

Judge Fong took the matter under advisement at the end of the hearing and on October 9, rendered his Decision which, basically, following that argument that he was bound by your Decision, so dismissed the entire case. This was about a month before trial.

So, I have filed a Supplemental Memorandum with you to my affidavit a copy of Judge Fong's Decision, and have before you what he said and did as an effect of your Decision.

In that connection, I would like to point out about three things, which I have

not said previously, in addition to my motion.

The first is that the effect of your Decision, about two weeks ago, is to cause a lawsuit which has been pending in Federal Court for over two years to be dismissed now without trial.

A second thing I'd like to point out is that the basis for your Decision is that the HPERB administrative proceeding which Mr. Caldeira filed over two years ago had tolling the one year period of limitation and I have included in some caes in my newest affidavit to show Your Honor that nothing has happened in the HPERB case at all. That is to to say, after Motions to Dismiss were filed HPERB had a hearing and Mr. Caldeira attended pro se.

HPERB took those motions under advisement, has never ruled, there has never been a decision and, of course,

there's been no trial in the HPERB Complaint. The case has simply been dormant until just very recently, a series of motions filed in that case as well.

I make this point to show that it seems to me to say that the HPERB proceeding is a reason for tolling the one year period, which the County would otherwise have to comply with, is giving far too much significance to a proceeding that has never gone anywhere.

The third point is that to use or advance a tolling a litigant usually comes to court showing some equity in its position. This is where the County is. And it says that -- use a statute -- we're moving to confirm under the statute, the one year period. We waited two years to file a Motion for Confirmation. But, it's okay because we have a right to toll that one year period.

Well, usually a litigant who says that shows that he is entitled to take advantage, say, of the discovery rule where he didn't know he was going to sue, didn't know he had a cause of action. Like the sponge the doctor leaves in a patient's stomach. He doesn't know about it, the period of runs.

Four, the litigant can't show he has some excuse why he didn't comply with the Statute of Limitation, or the litigant shows that he was prevented from filing on time by some sort of disability like, for instance, being a minor, or being out of state, or being absent.

Well, here the County has not offered any excuse at all for not complying with the one year period and, of course, it was not legally prevented from moving for confirmation right away. It could have if it wanted to. Instead, it doesn't do that. There is the HPERB proceeding,

there is Mr. Caldeira's Federal Court lawsuit. Two years go by; the parties are engaged in serious litigation in the Federal Court case. Much discovery is done. We get down to a month before trial and suddenly there's a Motion for Confirmation.

I don't think there's any equity in the County's position and I hope that Your Honor will reconsider that in connection with my motion.

THE COURT: All right. Mr. Perry, will you go first?

MR. PERRY: Yes.

THE COURT: Speak loudly so they can hear.

MR. PERRY: The --

MR. SMITH: Hello? I cannot hear Warren.

MR. PERRY: Okay. I'll try right over here.

THE COURT: Can you hear him now?

MR. SMITH: Yes.

MR. PERRY: Mr. Smith is arguing, basically, to the fact of the underlying justification for the confirming of the Arbitration award, and what he's arguing as to Judge Fong's actions because of the confirmation, it basically -- all he's saying is that Judge Fong followed the law in ruling on the effect of the confirmation of the Arbitration award.

As far as the tolling of the Statute of Limitations, I don't have any problem, and as far as equities go, his argument that the County of Kauai should have equities involved in that, I think I'll use Mr. Smith's own argument that he submitted in his Memo in Opposition that the whole purpose of the Arbitration proceeding was to have finality. And what with Mr. Caldeira's seeking relief from the Arbitration award at HPERB and in the Federal District Court, we are not getting

that finality that should have been gotten because of the Arbitration hearing.

The tolling of the Statute of Limitations, I think, is justified based on arguments which I and the attorney for the Union submitted, and I leave it up to --

MR. SMITH: I'm sorry; you're fading away.

MR. PERRY: And I leave it to the Judge after that.

THE COURT: Mr. Khim?

MR. KHIM: Thank you, Your Honor. Can everyone hear me okay?

THE COURT: Yes.

MR. SMITH: Yes, Your Honor, I can.

MR. KHIM: Okay. Basically, I would just like to briefly go over my argument that I submitted in my Memorandum in Opposition and Motion to Vacate. I trust the Court ahs received a copy of that.

THE COURT: Yes, I have received your voluminous submittal.

MR. KHIM: Thank you, Your Honor. Most of that voluminous material constitutes the transcript of the Arbitration proceeding, and I put the transcript in along with the affidavit of Arbitrator Ling to show the Court that there was no fraud, no corruption, and that the arbitration award was not gotten by undue means. It was a full and fair hearing. I think Mr. Perry can attest to the fact that he and I vigorously argued the case and it was a very, very hard fought trial, both sides fought their best and, unfortunately, I lost. But, that's the way the Arbitrator ruled.

And, Arbitration was enacted by the parties to get around the court proceedings, and you get one crack and that's it. If you win, you win; if you lose, you lose. And everyone is bound by

the decision of the Arbitrator for better or for worse, right or wrong.

I think that the Hawaii State Supreme Court has said in numerous cases, the Mars Constructors (phonetics) case, the one that really comes to mind, Your Honor, that the -- Supreme Court said that the arbitrator can be totally wrong on the law in the way he construe the facts, but that's just -- that's just the way it is. And since the parties put their faith into the hands of the Arbitrator, they have to take his Decision, even if the Arbitrator is totally off base. The only time they're entitled to vacate the award is if they had shown one of the four narrow grounds. And in this case Mr. Smith is trying to say that there is corruption, fraud, undue means.

And I think, as a said before, the transcript shows this thing was a long hard-fought case. It wasn't a half day

job where one side took a dive where, you know, through corrupt means, in essence, gave up unfairly. That's not what happened in this case. This case was very strenuously litigated, in good faith, in complete honesty by both sides.

So, I think, the evidence I submitted, coupled with the facts that Mr. Smith has not pointed to any specific document in his voluminous submission to this Court, with his Motion to Vacate, he doesn't point out which of those documents show fraud, corruption, or undue means.

I think those two factors alone shows tha the Motion to Vacate Arbitrator's Award should not be granted because the Arbitration was fair, was honest, was not corrupt, was not fraudulent, and undue means were not used to get the Arbitrator's award.

And, in addition, I ask a technical argument on why should the issues that

it's untimely -- there's 10 days under the Statute. Those 10 days were not tolled because Mr. Caldeira filed his HPERB Complaint four months after he got his decision, not less than 10 days, so the tolling, while it works for Mr. Perry, he has a one year statute of limitation, doesn't work for Mr. Caldeira and Mr. Smith because they only have a 10 day Statute of Limitation.

And, also, I believe the Motion to Vacate is improper because it's really a Rule 60 motion, and in this case you cannot claim mistake, inadvertence, excusable neglect, or newly discovered evidence, et cetera. He had this stuff long before. And none of those grounds for Rule 60 exists.

A Motion for Reconsideration is exactly that, Your Honor; reconsider what has already been submitted to the Court. The record, as it stands in this case, he

put in a whole new Motion to Vacate, and, I think as Your Honor would characterize, voluminous material, that he didn't put in when he first opposed the Motion to Confirm, Your Honor. That would say that if newly found evidence -- he's introducing new evidence, therefore, he doesn't have an excuse to bring it in to Rule 60.

If I might also briefly address Mr. Smith's arguments he made orally, now, Your Honor, the fact that Your Honor's Decision has an effect on a Federal Court case is irrelevant. If Mr. Perry is entitled to a confirmation of the award by law he should get it. If he is not entitled to it he shouldn't get it. I don't think the Court should look to the ramifications of granting awards in determining whether or not Mr. Perry's motion is meritorious. Even the Motion to Confirm is meritorious or it's not; it

stands on its own. And, if it's meritorious, so be it, and, you know, Mr. Perry and I are free to use it in whatever means we wish. For, after all, if it's correct under law, it's correct.

And the factor that -- Mr. Smith brings about the fact that nothing happened at HPERB after the Complaint was filed. I think, as Your Honor is well-aware, litigation often times takes a long time, takes a long time, and cases can go on for years. And the fact that HPERB did nothing, according to Mr. -- regarding this Complaint, is irrelevant.

But, moreover, HPERB did do lots of things. And Mr. Perry can attest to this. Both he and I and Mr. Caldeira were called in numerous times by HPERB, status conference, settlement conference, sit down and work things out. The Court was trying to, in that period -- Excuse me, Your Honor. The HPERB was trying to, in

that period of time, get the parties together to try to settle. So, far from nothing happening in the record, that may be because there's no motions or hearings or anything, but HPERB did try. They didn't just sit on their hands. They didn't just sit on their hands. They tried to get the parties together. They called status conferences, et cetera. So, there was some action on that part.

But, as I stated earlier even if there was no action on HPERB's part, you know, so long as the HPERB Complaint was filed before that, and, more over, Mr. Caldeira did nothing to further it along. He didn't push HPERB for a date, he didn't try to keep the process going.

THE COURT: Okay, Mr. Khim, I've heard enough already.

MR. KHIM: Thank you, Your Honor.

THE COURT: Mr. Smith, do you want to add anything in closing?

MR. SMITH: I might, Judge, but it depends on one question I have to ask the Court, and, that is, whether the Court is going to get into the merits of Mr. Caldeira's claims as I submitted the, or whether instead the Court takes the view that they are cut off by the 10 day period.

THE COURT: Well, in looking at your submittals and looking at the transcript of the arbitration proceedings, first of all, I do agree with Mr. Khim. It seems to me that they go around between Mr. Khim and Mr. Perry with Arbitrator Ling. The Arbitrator, I think, has tremendous patience, more than I would have had in a regular hearing. It seems to be hotly contested. But, in any case, Mr. Smith, when looking at all of the submittals, your motion is going to be denied, so, Counsel, prepare the appropriate Order.

MR. KHIM: I'm sorry, Your Honor; who did you request to prepare the Order.

THE COURT: Either you or Mr. Perry. Mr. Perry, I guess.

MR. KHIM: Okay.

THE COURT: He said he'll do it. Okay.

MR. PERRY: Thank you.

(The telephonic conference call was concluded.)

STATE OF HAWAII)
: S.S.:
COUNTY OF KAUAI)

I, FARINCEE BOYKIN, the Official Court Reporter in and for the State of Hawaii, County of Kauai, do hereby certify that the foregoing pages, 1 through 16, inclusive, comprise a full and correct transcript of the proceedings had in connection with the above-entitled cause.

DATED: Saturday, October 17, 1987, at Lihue, Kauai, Hawaii.

FARINCEE BOYKIN, C.S.R. NO. 106
OFFICIAL COURT REPORTER
STATE OF HAWAII, COUNTY OF KAUAI

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Attorney for Grievant

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

RONALD CALDEIRA,	)	S.P. NO. 87-0017
	)	
Grievant,	)	ORDER DENYING
	)	MOTION FOR
vs.	)	RECONSIDERATION
	)	AND MOTION TO
COUNTY OF KAUAI,	)	VACATE
et. al.,	)	ARBITRATION AWARD
	)	CERTIFICATE OF
Defendants.	)	SERVICE
	)	

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO VACATE ARBITRATION AWARD

This Court having reviewed Ronald Caldeira's motion for reconsideration and motion to vacate arbitration award, and having heard arguments on October 15, 1987, before the Honorable Kei Hirano,

with all parties having been represented by counsel,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said motions are denied.

DATED: Lihue, Kauai, Hi, Dec 15 1987.

JUDGE OF THE ABOVE-ENTITLED COURT

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

RONALD CALDEIRA	JUDGMENT IN A CIVIL CASE
v.	
	CASE NO.: 85-0869
COUNTY OF KAUAI, et al.	

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to ~~trial or~~ hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that summary judgment is entered in favor of defendants and against plaintiff as to plaintiff's sections 1983 and 1985 claims against County and HGEA defendants. Plaintiff's case based on any of the twelve "episodes" is DISMISSED.

cc: all parties of record

October 13, 1987
Date

_____
Clerk

_____
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RONALD CALDEIRA,	)	CIVIL NO. 85-0869
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
COUNTY OF KAUAI, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER DENYING PLAINTIFF'S

MOTION FOR RECONSIDERATION

I. Introduction

Plaintiff Caldeira moves the Court to reconsider its Order Granting Motion for Summary Judgment And To Dismiss, issued October 9, 1987. For the reasons set out below, the Court DENIES this motion.

Plaintiff Caldeira raises five general arguments to move the Court to reconsider its Order:

(1) The state court judgment is not entitled to full faith and credit under 28 U.S.C. section

1738.

(2) State law principles of res judicata and collateral estoppel do not bar plaintiff's civil rights claims.

(3) The court erred in its causation analysis concerning the alleged "episodes" of conspiracy and wrongdoing by defendants.

(4) The court erred in its summary judgment analysis regarding plaintiff's circumstantial evidence of a conspiracy by defendants.

(5) The court erred in granting summary judgment and dismissal because even if the defendant HGEA is not a co-conspirator it is a joint tortfeasor.

The Court addresses each of these arguments in turn.

II. Discussion

A. The State Court Judgment and Full Faith and Credit

The Court stated in its Order:

> It is well settled that 28 U.S.C. section 1738 requires federal courts to give an administrative adjudication reviewed by a state court the same full faith and credit the adjudication would enjoy in the state's own courts. Mack v. South Bay Beer Distrib., Inc.,

> 798 F.2d 1279, 1283 (9th Cir. 1986) (citing Marrese v. American Academyof Orthopaedic Surgeons, 470 U.S. 373 (1985); McDonald v. City of West Branch, 466 U.S. 284 (1984). . . .
>
> Under the rule set forth in Mack, then, the court must give the state court affirmation of the arbitration decision full faith and credit under 28 U.S.C. section 1738. Specifically, the court must accept as given that the plaintiff was discharged for just and proper cause, and that the plaintiff's alleged constitutional deprivation or injury, being the discharge, was self-inflicted by his insubordination in the face of a valid work order by defendant County. Accordingly, "episode" eleven cannot substantiate the plaintiff's section 1983 claims against the defendants.

Order at 4-5.

Nowhere in the plaintiff's memorandum does he address the holding of the Ninth Circuit in Mack. Instead, he digresses in a lengthy discussion on his interpretation of how the full faith and credit clause should be applied in this case. The Ninth Circuit, however, has already set out in Mack what a federal district court must do

when it encounters a final state court judgment that the state's courts would give preclisive effect: it must give the judgment full faith and credit under 28 U.S.C. section 1738.

Plaintiff Caldeira can pursue a reversal of the state court judgment in the state courts. The Court notes that Judge Hirano, author of the state court judgment confirming the arbitrator's award finding defendant County discharged

B. The Court's Causation Analysis

Plaintiff Caldeira attacks the Court's causation analysis on several grounds. To the extent the Court was unclear, it repeats the basis of its legal reasoning here.

> Causation is an essential element of every section 1983 and section 1985 cause of action. Arnold v. IBM, 637 F.2d 1350, 1355 (9th Cir. 1981). In a section 1983 action, the plaintiff must show the defendant caused a deprivation of his constitutional rights. Id. In a section 1985 action, the plaintiff must show that

> acts done in furtherance of a conspiracy by defendant caused the plaintiff's injury. Id. Furthermore, the causation requirement of sections 1983 and 1985 is not merely cause in fact, but proximate cause or legal causation. Id.

Order at 5.

The Court stated in its Order that the discharge was caused by the insubordination of the plaintiff in the face of a valid work order, as found by the arbitrator and confirmed by the state court. The Court was bound to accept this causal connection under Mack. To the extent the Court's tangential superceding cause analysis was misleading, it restricts attention to its central and salient conclusion that the alleged wrongdoing of the defendants' was neither the cause in fact nor the proximate cause of plaintiff Caldeira's harm. See Order at 6.

D. Court's Treatment of Plaintiff's Circumstantial Evidence

Plaintiff Caldeira seizes on the Court's use of the phrase post hoc ergo propter hoc as a means to question its reasoning regarding its evaluation of the plaintiff's circumstantial evidence of a conspiracy between defendants HGEA and County to deprive him of his constitutional rights. To the extent that the Court was unclear, it restates its position regarding the plaintiff's circumstantial evidence.

Plaintiff Caldeira stats that "this Court erred in ruling that Caldeira's circumstantial evidence of conspiracy is insufficient because it proceeds from post hoc rationalization." See Memorandum at 3. Plaintiff Caldeira misunderstands and mischaracterizes the Court's reasoning and finding. The Court found that under the standards for summary judgment as enunciated by the Ninth Circuit, see, e.g., Commodity Futures Trading Comm'n v.

Savage, 611 F.2d 270, 282 (9th Cir. 1979), T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 [1986]), and Eisenberg v. Insurance Co. of North America, 815 F.2d 1285, 1289 (9th Cir. 1987) (citing Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2512 [1986]), that plaintiff had failed to meet its burden to defeat the defendant's motion for summary judgment.

The secondary reference to post hoc ergo propter hoc was in the manner of characterization and was not part of its reasoning or conclusion. What the Court meant by this reference was simply that the plaintiff apparently wished the Court to draw the inference, unsupported byany direct evidence or any circumstantial evidence that would convince a fair-minded jury to find in his favor, that because he

was discharged by the County it therefore was because of a conspiracy on the part of the defendants. Such is a fair and general usage of the phrase post hoc ergo propter hoc, plaintiff's citations to several works on argument and logic notwithstanding.

Furthermore, the Court adds that Ninth Circuit has stated in a recent opinion discussing the standards for summary judgment: "[I]f the the factual context makes the non-moving party's claim implausible, the party must come forward with more persuasive evidence than would otherwise be necessary to show there is a genuine issue for trial." California Arch. Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co. Zenith Radio Corp., 475 U.S. 574 [1986]). It added that "no longer can it be argued that any disagreement about a material

issue of fact precludes the use of summary judgment." Id. Given the factual record of this case, as represented in the record and oral argument, the Court finds that plaintiff Caldeira's claims of conspiracy are implausible. Finding that the plaintiff failed to meet the ordinary "significant probative evidence" standard to defeat summary judgment, see Commodity Futures, 611 F.2d at 282, a fortiori the Court cannot see how he could defeat the motion for summary judgment under the higher standard specified in Franciscan Ceramics.

Furthermore, the court determined that "episode" twelve cannot support the plaintiff's section 1985 cause of action, following a causation analysis under Arnold v. IBM, 637 F.2d 1350, 1355 (9th Cir. 1981), a failure of supporting section 1983 analysis under Cassettari v. Nevada County, Cal., 824 F.2d 735, 739

(9th Cir. 1987) (citing Dooley v. Reiss, 736 F.2d 1392, 1395 [9th Cir.], cert. denied, 469 U.S. 1038 [1984]), and/or a summary judgment analysis under T.W. Elec. and Eisenberg. Plaintiff Caldeira presents no evidence or argument to convince the Court that it should reconsider its analysis under Cassettari or Arnold, in addition to its analysis under T.W. Elec. and Eisenberg. If the Court is correct in its analysis on ay of these, and it believes it is correct in all of them, this would be sufficient to grant summary judgment or dismissal against plaintiff. See Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

E. Defendant County as Joint Tortfeasor

Finally, plaintiff argues that even if defendant HGEA was not a co-conspirator, it was a joint tortfeasor and therefore the Court should not have dismissed the suit. Plaintiff in raising

this argument fails to realize that the same causation analysis that prevented the plaintiff's sections 1983 and 1985 claims must defeat his common law tort claims. Sections 1983 and 1985 incorporate the same causation principles. See, e.g., Martinez v. California, 444 U.S. 277,285 (1980); Carey v. Piphus, 435 U.S. 247, 257-58 (1978); Arnold, 637 F.2d at 1355. Accordingly, this argument does not provide the Court with a basis to reconsider its Order.

III. Conclusion

There being no evidence or argument in the plaintiff's present motion to convince the Court to reconsider its Order Granting Motion For Summary Judgment And To Dismiss, the plaintiff's Motion for Reconsideration is DENIED.

This Order does not supplement the previous Order except to the extent needed

to explain any ambiguities therein.

IT IS SO ORDERED.

DATED: Honolulu, HI, Oct. 26, 1987

UNITED STATES DISTRICT JUDGE

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of RONALD R. CALDEIRA, Complainant, and TONY T. KUNIMURA, Mayor, County of of Kauai, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO, Respondents.	CASE NOS.: CE-03-97 CU-03-50 ORDER NO. 714 ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

On April 8, 1985, Complainant RONALD R. CALDEIRA filed the instant prohibited practice complaint with the Hawaii Labor Relations Board [hereinafter referred to as Board] against Respondents TONY T. KUNIMURA, Mayor of the County of Kauai [hereinafter referred to as Employer or Kauai County]; HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME LOCAL 152, AFL-CIO

[hereinafter referred to as HGEA or Union]; Charles K.Y. Khim; and Stanley Ling. The complaint, in a detailed and extended manner, relates Complainant's work history with Kauai County as a lifeguard since his initial hiring in 1978. The complaint reviews the conflicts Complainant experienced with his superiors at the worksite and in administration, with work colleagues. It covers an incident in 1983 when Complainant was ordered to do some yard and janitorial work and his subsequent discharge for insubordination for refusal to do that work. It finally covers the arbitration proceedings at which Complainant contested his discharge and questions the propriety of the representation provided by Respondent HGEA at the said arbitration. The complaint charges violations by the County of Subsection 89-13(a)(8), Hawaii Revised Statutes [hereinafter referred to

as HRS], and violations by Respondent HGEA, Khim and Ling of Subsection 89-13(b)(5), HRS.

Motions to dismiss were entered by Stanley Ling, the HGEA, Charles Khim and Kauai County on April 23, 1985, April 29, 1985, April 29, 1985 and May 8, 1985, respectively. Kauai County also filed a Motion for Particularization of Complaint on April 25, 1985. This motion was denied by the Board in an order dated May 3, 1985.

At a hearing on May 10, 1985, on the motions to dismiss of Ling, the HGEA and Khim, Complainant stated that the remedy he sought was an overturning of the arbitration decision, reversion of his grievance to Step III of the grievance process or re-arbitration, and reinstatement to his job. Transcript of Hearing [hereinafter referred to as Tr.], May 10, 1985, pp. 5-8. At said hearing,

Complainant raised allegations regarding alleged misinformation furnished by the County to the arbitrator, the overlooking by the arbitrator of the role Complainant's industrial leave played in his job absence, and the effectiveness of representation furnished by the HGEA at the arbitration. Tr., May 10, 1985, pp. 6, 9, 10 and 11.

The motions to dismiss of Ling, the HGEA and Khim were taken under advisement after the hearing on May 10, 1985, after statements by the Board Chairperson that the proper venue to seek vacation of an arbitration decision under statute would be the Circuit court, and that the Board's jurisdiction to overturn arbitration decisions extends only to arbitration decisions based on collective bargaining law but not on the applicable collective bargaining contract. Tr., May 10, 1985, pp. 14-16.

On January 15, 1987, Complainant filed an Amended Complaint in the federal District Court alleging that Kauai County, since about 1978, subjected Complainant to a conspiracy to obtain Complainant's discharge; and that HGEA participated knowingly in the County conspiracy to discharge Complainant. Complainant, therefore, sought restoration of his job with Kauai County. Federal Amended Complaint, attached to Kauai's Memorandum of Points and Authorities, Exhibit E, p. 14.

On September 3, 1987, Complainant, through attorney Robert A. Smith, filed a Motion for Withdrawal of Complaint. Said motion was filed prior to the issuance of a final order herein and asked that the Board consent to the withdrawal.

On September 18, 1987, the HGEA and Khim filed a Motion to Dismiss Complainant's Motion for Withdrawal. Said

motion requested that Complainant's motion to withdraw complaint be dismissed on the ground that said motion was improper, on the alleged basis that Respondents had not been served with Complainant's foregoing motion.

On September 18, 1987, the HGEA and Khim also filed a Counter Complaint, or in the Alternative, Counter Petition for Declaratory Order. Therein, the HGEA and Khim petitioned the Board for a declaratory order stating that Respondent HGEA did not violate Chapter 89, HRS, in any action it took on behalf of Complainant or in regard to Complainant, in conjunction with the grievance and arbitration of Complainant's discharge from Respondent KUNIMURA's employ.

On September 23, 1987, Complainant filed a Memorandum in Opposition to Motion to Dismiss Complainant's Motion for Withdrawal.

The Circuit court for Kauai County confirmed the arbitration decision on September 25, 1987.

On September 28, 1987, Complainant filed a Motion to Dismiss Counter Complaint or Counter Petition for Declaratory Order with the Board.

On October 9, 1987, the federal District Court issued an Order Granting Motion for Summary Judgment and to Dismiss. Federal Order, p. 13, attached to Kauai's Memorandum of Points and Authorities filed in support of its Motion to Dismiss, Exhibit D.

The Circuit Court for Kauai County denied reconsideration of the confirmation on October 15, 1987 (Kauai's Memorandum, supra, p. 15).

On October 21, 1987, Complainant filed Claimant's Withdrawal of Motion for Withdrawal of Complaint. In an affidavit attached hereto, Complainant's counsel

stated that in light of recent adverse decisions in both the State circuit and federal courts, Complainant was reassessing the intent to withdraw his original complaint, and thus now sought to preserve the original complaint before this Board.

On October 21, 1987, and concurrently with the aforementioned Claimant's Withdrawal of Motion for Withdrawal of Complaint, Complainant filed a Motion for Leave to File First Amended Complaint. The stated grounds for this motion was that the complaint, as originally filed, was filed by Complainant without benefit of legal counsel. See Notice of Hearing, dated November 2, 1987.

After a hearing on November 16, 1987 on the filings enumerated in the Notice of Hearing, dated November 2, 1987, the Board, in Order No. 653, dated November 25, 1987, granted Claimant's Withdrawal of

Motion for Withdrawal of Complaint. Respondent HGEA and Khim's Withdrawal of Counter Complaint, or in the Alternative, Counter Petition for Declaratory Order, proffered at the hearing on November 16, 1987 were also granted in Order No. 653. In addition, Complainant's Motion for Leave to File First Amended Complaint was granted. Pursuant to said motion, Khim and Ling were dismissed as parties to the instant case. Also, as enumerated in Order No. 653, all parties agreed to submit written briefs on the issue of which charges included in Complainant's First Amended Complaint fall under the jurisdiction of the Board, and which charges are foreclosed by the statute of limitations, doctrine of res judicata or other jurisdictional doctrines.

I. STANDARD FOR BOARD DELIBERATION

Kauai County filed a Motion to Dismiss, dated December 16, 1987, and the HGEA also filed Motion to Dismiss, or in the Alternative, for Summary Judgment, dated December 16, 1987.

> On a motion to dismiss, the issue is not whether plaintiff ultimately will prevail, but whether he is entitled to offer evidence to support his claim; the trial court may not grant a motion to dismiss for failure to state a claim unless it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Rule 12(b)(6), 28 U.S.C.A., Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987).
>
> Although a motion to dismiss for failure to state a claim should rarely be granted, a complaint may be dismissed when it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Au v. Au, 63 Haw. 210, 263, 626 P.2d 173, 181 (1981).

Thus, the board is presented with a situation where, if beyond a reasonable doubt, it appears that based on the

deliberations of the various tribunals Complainant has appeared before, there are no further facts which could change the negative outcome Complainant received in the arbitration of his grievance, the motion to dismiss should be granted.

II. STATUTE OF LIMITATIONS

Complainant has broken down his work history with Kauai County into 12 different "episodes." See Proposed First Amended Prohibited Practice Complaint, filed on October 21, 1987, (incorporating by reference federal Amended Complaint), and Exhibit B, list of 12 Episodes. Episodes 1 through 10 involved alleged wrongdoing by Defendant County to develop a negative work record and hostile work environment for the Plaintiff, to effect his eventual discharge. Episodes 3 through 10 also involved alleged wrongdoing by HGEA, in which the Plaintiff

claims it conspired with the County by acquiescing in the scheme to effect his discharge by failing to represent him adequately and thereby facilitate the development of his negative work record and hostile work environment. Episode 11 involved incidents occurring during the pool closing in 1983 when the Plaintiff was ordered to do yardwork and janitorial work, which Plaintiff refused to do. Plaintiff was suspended and discharged and thereafter went through arbitration. Episode 12 involved the alleged wrongdoing of the County and HGEA to distort and misrepresent the record presented to the arbitrator to prevent the Plaintiff from having a fair hearing.

Sections 89-14 and 377-9, HRS, require that complaints be filed within 90 days of their occurrence. See also Administrative Rules Sec. 12-42-42(a).

The complaint herein was filed on April 8, 1985. Thus, only acts or occurrences occurring since January 9, 1985 come within the Board's jurisdiction.

Complainant was hired in 1978 and worked for Kauai County until November 1, 1983. Complainant alleges that beginning in late 1978 or early 1979 (see federal Amended Complaint and Motion for Leave to File First Amended Complaint, Exhibit B) the conspiracy began with the developing conflict between Isaac Hookano and Complainant, which continued through his discharge in late 1983 and culminated finally with the arbitration, which took place on September 27 and 28, 1984, with the decision issuing January 15, 1985. Kauai County argues that not even the arbitration decision comes within Board jurisdiction since the arbitration hearings occurred before the 90-day limit began, i.e., on September 27 and 28, 1984.

Kauai County thus argues that all 12 episodes fall outside the Board's jurisdiction (see Kauai County's Memorandum of Points and Authorities, p. 10). The HGEA, however, argues that the first 11 episodes fall outside of the Board's jurisdiction. (Memorandum in Support of Motion to Dismiss First Amended Complaint or in the Alternative for Summary Judgment, p. 8).

Complainant filed the motion to amend his complaint on October 21, 1987. However, through the doctrine of "relation back," the 90-day period is measured from the date of the filing of the original complaint on April 8, 1985. However, even using the doctrine of relation back, Episodes 1 through 11 fall without the 90-day statute of limitations. The arbitration decision issued on January 15, 1985, however, comes within the 90-day limit, even though the arbitration

hearings were held on September 27 and 28, 1984. Applying the 90-day limit, only the issuance of the arbitration decision on January 15, 1985 comes within the statute of limitations.

Complainant argues that the Union should have put before the arbitrator not merely the events of Episode 11 but the 10 preceding episodes as well going back to the beginning of Claimant's employment. (See Memorandum of Claimant Re Issues of Statute of Limitation and Res Judicata, p. 11.) Claimant argues that he is entitled to an order of the Board directing re-arbitration of the matter upon a full evidentiary record taking into account Episodes 1 through 10.

Complainant argues that the first amended complaint is timely because of the doctrine of relation back to the date of the original pleading. This argument is accurate insofar as it goes. The amended

complaint itself is considered timely as it is deemed to be filed on the date of the original complaint, i.e., April 8, 1985. But the episodes brought up for Board consideration in the amended complaint occurring outside the 90-day statute of limitations as measured from the date of the original complaint are still considered to be outside the 90-day statute of limitations. Complainant argues that Episodes 1 through 10 "arose out of" Episode 11, i.e., his dismissal for insubordination in late 1983, and since they "arose out of" the insubordination charge and dismissal comprising Episode 11, they are not barred for consideration by the statute of limitations.

Under federal labor law, evidence of earlier events occurring before the statute of limitations runs, may be introduced to shed light on the true

character of matters occurring within the limitations period, where occurrences within the limitations period in and of themselves may constitute prohibited practices as a substantive matter. International Association of Machinists v. NLRB, 362 U.S. 411, 416, 4 L.Ed.2d 832, 80 S.Ct. 822 (1960); NLRB v. Food Fair Stores, Inc., 307 F.2d 3 (3rd Cir. 1962). But where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice, evidence of the earlier unfair labor practice is inadmissible. International Association of Machinists v. NLRB, 362 U.S. 417, 422.

In deciding whether the complaint makes mere proper evidentiary use of events anterior to the limitational period or whether it improperly resurrects a defunct charge, the Board must keep in

mind that the purpose of limitation is to prevent persons from being brought to book on stale charges and to promote industrial stability by allowing parties, after a reasonable time period, to assess with certainty their liability for past conduct. Independent violations of continuing obligations do not exist where illegality of conduct cannot be established without assessing events outside the limitational period. NLRB v. Auto Warehouses, Inc., 571 F.2d 860 (5th Cir. 1978). Evidence of antecedent events may be used as background, NLRB v. Ryder Tank Lines, Inc., 310 F.2d 233, 234 (4th Cir 1962); NLRB v. Sharples Chemical, Inc., 209 F.2d 645, 653 (6th Cir. 1954), or to shed light on the true character of events occurring within the limitation period. General Motors Acceptance Corp. v. NLRB, 476 F.2d 850, 853 (1st Cir. 1973); International Union United Auto,

Etc. v. NLRB, 124 App.D.C. 215, 363 F.2d 702, 706 (D.C. Cir. 1966), cert. den., 385 U.S. 973, 17 L.Ed.2d 436, 87 S.Ct. 510 (1966); NLRB v. Shawnee Industries, Inc., 333 F.2d 221, 224 (10th Cir. 1964); NLRB v. Fitzgerald Mills Corp., 313 F.2d 260, 264 (2nd Cir. 1963), cert. den., 375 U.S. 834, 11 L.Ed.2d 64, 84 S.Ct. 47 (1963).

However, in the present case, Complainant wishes to have Episodes 1 through 10, occurring outside the limitations period, considered as substantive evidence of a conspiracy. He does not wish to have the episodes considered as background or to shed light on Episodes 11 and 12. They themselves constitute the substance of the conspiracy which Complainant charges warrants re-arbitration. Episodes 1 through 10 may, therefore, be considered outside the limitations period and beyond the Board's jurisdiction on this basis. Thus, in the

present case, it appears proper to prohibit consideration of Episodes 1 through 10 because, rather than constituting mere background facts indicating a conspiracy, or shedding light on the conspiracy, Episodes 1 through 10 constitute the conspiracy itself. The conspiracy cannot be established without incorporating, as actual substance of the charge, conduct occurring without the limitations period. To consider Episodes 1 through 10 to establish a conspiracy would improperly resurrect defunct charges or issues.

III. RES JUDICATA

In its motion to dismiss, Kauai County argues that the doctrines of res judicata and/or collateral estoppel bar Complainant from bringing this action because an arbitrator, this Board, the Kauai Circuit court and the federal

District Court have all rendered decisions on every legally actionable item which Complainant alleged in his original and amended complaints.

The doctrines of res judicata and collateral estoppel provide that the judgment of a court of competent jurisdiction is a bar to a new action in another court between the same parties or their privies concerning the same subject matter. It precludes the relitigation, not only of the issues that were actually litigated in the first action, but also grounds of claim and defense which might have been litigated in the first action but were not litigated or decided. Santos v. State, 64 Haw. 648 (1982) [Kauai's Memorandum of Points and Authorities, p. 18].

Kauai County notes that the following actions have been filed:

1. A collective bargaining grievance which resulted in Arbitrator Ling's upholding the termination;

2. Filing of a civil rights action in federal District Court which incorporated the amended prohibited practice complaint filed herein. The federal District Court dismissed the action based on a consideration "all episodes cited by Complainant";

3. Unsuccessful challenge in the Kauai Circuit Court of the County of Kauai's motion to confirm the arbitrator's award; and

4. Unsuccessful request to the Kauai Circuit Court to reconsider its confirmation, or, to vacate the award.

In the Federal Order Granting Motion for Summary Judgment and to Dismiss, Judge Fong wrote "the court concludes that the Plaintiff has not presented any facts probative of a conspiracy between

Defendant HGEA and Defendant County" (federal Order, p. 13, attached to Kauai's Memorandum of Points and Authorities as Exhibit D). Fong further stated: "The Defendant's motions for summary judgment against the Plaintiff's Sections 1983 and 1985 [civil rights] claims against both the County and HGEA, Defendants, are granted. There being no further claims in the complaint for trial, the Plaintiff's case based on any of the 12 'episodes' is dismissed."

In the federal Order, Judge Fong gave the State court confirmation of the arbitration decision full faith and credit under 28 U.S.C. Sec. 1738. Therefore, he accepted that the Complainant was discharged for just and proper cause. Thus, Episode 11, i.e., the discharge, could not be the basis for Complainant's civil rights claims against both defendants (federal Order, p. 5).

Fong then went on to examine Episodes 1 through 10 to see if they could substantiate claims of civil rights violations, Fong found, however, that the discharge was caused by the insubordination of Complainant in the face of a proper work order and not by any alleged wrongdoing of the defendants in Episodes 1 through 10 (federal Order, p. 6).

Fong then examined Episode 12, i.e., the arbitration, to see if it substantiated Complainant's civil rights claims. Fong found no evidence of a conspiracy. The failure to present a record of Episodes 1 through 10 proved no conspiracy as Complainant's insubordination, and not Episodes 1 through 10, caused Complainant's dismissal (federal Order, p. 8). As the federal court was bound to accept the State court's confirmation of the arbitration

decision, Fong found no deprivation of civil rights, and therefore no conspiracy. Fong found the standards for summary judgment met against the allegations of a conspiracy.

In regard to Episode 11, i.e., the discharge, the federal District court held that it had to give full faith and credit to the Fifth Circuit's confirmation of Arbitrator Ling's award and, therefore, had to accept as given that complainant was discharged for just and proper cause (federal Order, pp. 4-5).

The federal court did not, however, find that it had to give full faith and credit to the entire arbitrator's decision or confirmation by the Kauai Circuit Court. The court analyzed whether Complainant had provided sufficient facts regarding the alleged conspiracy between the County and HGEA during arbitration. In doing so, the court found that

Complainant had failed to present the court with any direct or even "circumstantial evidence from which a fair-minded jury could draw inferences in his favor. Instead the Complainant attempts to base his conspiracy allegations on essentially post hoc ergo propter hoc rationalization" (Exhibit D, p. 12). The federal District Court found unactionable every "episode" upon which Complainant based his claims for relief. The court thus granted the County's and HGEA's motion for summary judgment regarding Complainant's conspiracy claim.

Thus, the County argues that this finding of the federal District Court must be res judicata or collaterally estops any action by this Board because Claimant's challenge to actions which were supposedly violative of Chapter 89, HRS, were or should have been an essential part of his federal action. Kauai County argues that

Complainant's arguments that State statutes requiring that he be fired only for good cause either (1) were actually litigated inthe federal action of (2) should have been litigated in his federal action. In either case, Kauai County argues, this Board must give the federal decision res judicata and/or collateral estoppel effect.

Kauai County further argues that this Board must also give res judicata and collateral estoppel effect to the Fifth Circuit's confirmation of and/or its refusal to reconsider the confirmation of Arbitrator Ling's award. Kauai County cites Santos v. State, supra, to the effect that the State court's confirmation of the arbitration decision constitutes an entry of judgment under HRS Section 658-12, which has a binding res judicata and collateral estoppel effect on other Hawaii courts.

Complainant argues that the Kauai County's confirming the arbitration award under Section 658-8, HRS, which was transformed into a judgment under Section 658-12, HRS, does not bar the Complainant's amended complaint under the doctrine of res judicata, because the union did not put into evidence before the arbitrator Episodes 1 through 10 so that they were not adjudicated on their merits (Memorandum of Claimant Re Issues of Statute of Limitations and Res Judicata, pp. 11-12).

The distinction between res judicata and claim preclusion on the one hand and collateral estoppel and issue preclusion on the other are distinguished in Marsland v. International Society for Krishna Consciousness, 66 Haw. 119, 124, 657 P.2d 1025 (1983). Claimant's Memorandum, p. 12.

Complainant claims that there is no claim preclusion arising from the arbitration decision since he could not have litigated a prohibited practice charge in the arbitration. Claimant's Memorandum, p. 13. The union, Complainant argues, did not put into evidence Episodes 1 through 10 and defend him on the basis of a conspiracy allegation. The union is thus estopped from invoking the doctrine of res judicata so as to protect itself from its own misconduct, Complainant argues. Thus, Complainant argues the merger (bar) or claim decision branch of the res judicata doctrine, which covers all of litigant's claims (including not only those which were actually litigated but also those which "might have been" litigated) does not bar raising of issues related to Episodes 1 through 10.

Complainant also argues that collateral estoppel or issue preclusion

does not apply. Collateral estoppel, Complainant points out, covers only issues which were actually litigated in the prior litigation. Complainant argues that the conspiracy claim now before the Board charging a long-standing conspiracy lasting five years consisting of 12 episodes was a different claim than was put before the arbitrator and was not determined by him. Thus, the arbitration, even as confirmed by Judge Hirano in a "judgment," does not have collateral estoppel (issue preclusion) effect; and Complainant is free to litigate the issues of Eposides 1 through 10 and Episode 12 before this Board. Claimant's Memorandum, p. 14.

Complainant further argues that there is no claim preclusion because Judge Hirano's judgment was not "on the merits" as is required by the doctrine of res judicata. Although the documentary

evidence and Complainant's contention based on the 12 episodes were placed before Judge Hirano on the motion for reconsideration, Complainant states that Hirano gave "no consideration to this evidence or these contentions". Claimant's Memorandum, Note 2, p. 15. Complainant further argues that Hirano had no jurisdiction to decide the prohibited practice claim which was in turn based on the conspiracy claim. Complainant claims that inadequate representation was not considered because it was not asserted within ten days of the arbitration award. Claimant's Memorandum, Note 2, p. 15.

Claimant argues that there is no claim preclusion regarding the prohibited practice claim since it did not come into existence until after the arbitration decision, when it allegedly became apparent that the union had conspired in the arbitration to deprive Complainant of

rights protected under Chapter 89.

Moreover, Complainant argues that Hirano's judgment confirming the arbitration award has no res judicata effect since it arise after Claimant filed his prohibited practice complaint before this Board. The litigation resulting in the State court judgment thus was not the first or prior litigation; it was the second and subsequent litigation commenced by the County. Thus, Hirano's judgment is not a prior judgment entitled to res judicata effect. Claimant's Memorandum, pp. 17-18.

Complainant also claims that Judge Fong's federal court decision has no res judicata effect, because it was not a decision "on the merits". Memorandum of Claimant Ronald Caldeira in Opposition to Motions to Dismiss or for Summary Judgment, p. 2. This is so, Complainant argues, because Judge Fong, in the federal

decision, granted summary judgment on the basis that he was obliged by the full faith and credit statute, 28 U.S.C. Sec. 1738, to give res judicata and collateral estoppel effect to the Fifth Circuit Court's judgment confirming the arbitration award. Fong's decision thus was not on the merits, Complainant argues. He specifically held, Complainant claims, that he was precluded by legal doctrines from looking at the merits.

Complainant's reasoning is faulty in this regard. Fong states that the full faith and credit statute only requires him to accept that the discharge was proper. However, Fong in his decision reviews all 12 episodes formulated by Complainant and arrives at the conclusion that no conspiracy claim could be established on such proof.

HGEA argues that the prior Board Decision No. 196, Caldeira and Eduardo

Malapit, Mayor of the County of Kauai, and Hawaii Government Employees Association, 3 HPERB 523 (1984), in which this Board held that HGEA did not violate Chapter 89 in its representation of Complainant regarding a 20-day disciplinary suspension over an incident involving allegations of a near-drowning, bars further litigation thereon through the doctrine of res judicata. As a final decision, the prior Board decision has res judicata effect precluding relitigation of the claim herein. This is Episode 8 in Complainant's chronology.

Rule 41(b), Federal Rules of Civil Procedure (FRCP) states "unless the court in its order for a dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party

under Rule 19, operates as an adjudication upon the merits." An adjudication on the merits is res judicata and operates to bar another action on the same cause between the same parties or privies. The label "with prejudice" signifies dismissal is adjudication on the merits and a bar to further litigation on the claim. Korvettes, Inc. v. Brous, 617 F.2d 1021, 1024 (3rd Cir. 1980). A dismissal which either specifically states that it is with prejudice or is silent on the issue consitutes a dismissal with prejudice. Hall v. Tower Land & Invest. Co., 512 F.2d 481, 482-483 (5th Cir. 1975). Unless they fall into exceptions specified in Rule 41(b), non-41(b) dismissals are with prejudice. Reinhart v. Locke, 454 F.2d 313, 314-315 (7th Cir. 1971).

An example of a dismissal for reasons "otherwise specified" is where dismissal is for failure to comply with a discovery

order. Such is not a dismissal on merits as the court has otherwise specified grounds for dismissal. This is an example of a dismissal "not provided for in Rule 41" but which was for a specified reason not going to the merits of the claim; thus, it is a dismissal not on the merits. Lohman v. Gen. Am. Life Ins. Co., 478 F.2d 719, 721-723 (8th Cir. 1973), cert. den. 414 U.S. 857, 38 L.Ed.2d 107, 94 S.Ct. 162 (1973).

Since the full faith and credit doctrine requires that judgments entered in federal or State courts be given effect by other courts, dismissal of an action in federal court, which, by the operation of Rule 41(b) is an adjudication on the merits, is res judicata in an action on the same claim in State court. Peros v. Ciade Nav Mar Netumar, 349 N.Y.S.2d 926, 927 (N.Y. Civ. Ct. 1973); Curry v. Educoa Preschool, Inc., 580 P.2d 222, 223 (Utah

1978).

Applying FRCP Rule 41(b) to the case at bar, it would appear that Judge Fong's decision was on the merits and, therefore, has res judicata effect. (That the FRCP applies herein is clear. Moore's Federal Practice Par. 0.410[1] states: "When successive actions span jurisdictional lines, the full faith and credit statute requires that the extent of preclusion of the judgment is governed by the law of the jurisdiction that rendered it.") The decision did not specify that it was not an adjudication on the merits. Neither was the dismissal for lack of jurisdiction, improper venue, or failure to join a party such as would cause it to be not on the merits under Rule 41(b). Fong does not specify other grounds for dismissal which would prompt the conclusion that the dismissal was not an adjudication on merits. While he does

mention the full faith and credit clause in his decision, this is only the grounds for accepting the validity of Complainant's dismissal as determined in the arbitration, and is not the basis for the dismissal of the federal case as a whole. Citation of the full faith and credit clause is thus not a reason "otherwise specified" for dismissal which would make the dismissal an adjudication not on the merits. Fong, in fact, explicitly states "the court approaches the disposition of the defense's motion [for summary judgment] in terms of the alleged 12 'episodes.'" (Federal decision, p. 2) This amounts to a declaration that the federal decision is, in fact, on the merits.

Thus, it appears that the Board is precluded through res judicata effect of the federal decision from considering Complainant's claims before the Board.

For a prior judgment to bar an action on the basis of res judicata, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits, and the same cause of action must be involved in both cases. Hall v. Tower Land & Invest. Co., supra, 512 F.2d at 483. These three criteria appear to be met, in regards to the federal proceeding: the federal district court exercised competent jurisdiction, the order issued amounts to a final judgment on the merits, and the same cause of action is involved in both the federal case and the complaint before the Board.

The standards for res judicata are alternately stated in Hall v. State of Hawaii, _____ Haw.App. _____ (No. 11992, May 26, 1988), a case with facts paralleling those herein. In Hall, the Hawaii Court of Appeals affirmed an order

dismissing Hall's amended complaint. The amended complaint charged inter alia, that Hall's denial of admission to law school for the 1984 and 1985 admission years violated the U.S. and Hawaii Constitutions and federal and state statutory and common law. Hall had previously filed a U.S. District Court suit alleging unconstitutional and unlawful denial of admission in the 1984 admission year. This previous suit requested substantially the same relief as that requested in the case in question. Defendant's motion for summary judgment in federal district court was granted. The Ninth Circuit affirmed the judgment. Thereafter, defendants in the case in question filed a Motion to Dismiss Or In the Alternative for Summary Judgment which was granted and Hall entered the appeal in question. Id. pp. 3-5. The Hawaii Court of Appeals denied the appeal.

In holding the first case precluded the second case, the Court discussed the principles of res judicata:

> The principles governing the instant case are stated in Silver v. Queen's Hospital, 63 Haw. 430, 629 P.2d 1116 (1983), in which the supreme court affirmed a summary judgment against the plaintiff on the grounds that under the doctrine of res judicata a dismissal of the plaintiff's prior federal suit barred the state action.
>
> The doctrine of res judicata essentially provides that "[t]he judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim or defense which might have been properly litigated in the first action but were not litigated or decided." Estate Bernice P. Bishop, 36 Haw. 403, 416 (1943). In the application of the doctrine, three basic questions must ordinarily be answered in the affirmative: (1) Was the issue decided in the prior action identical with the issue presented in the present action? (2) Was there a final judgment on the merits in the prior action? (3) Was the party

against whom the doctrine is asserted a party or in privity with a party to the previous adjudication? Morneau v. Stark Enterprises Ltd., 56 Haw. 420, 424, 539 P.2d 472, 475 (1975).

An aspect of res judicata which is often determinative is collateral estoppel "which precludes the relitigation of a fact or issue which was previously determined in a prior suit on a different claim between the same parties or their privies. . . . [It] also precludes relitigation of facts or issue previously determined when it is raised defensively by one not a party in a prior suit against one who was a party in that suit and who himself raised and litigated the fact or issue. Ellis v. Crockett, 51 Haw. 45, 55-56, 451 P.2d 814, 822 (1969)." Id., 63 Haw. at 435-436, 629 P.2d at 1121 (footnote added).

The res judicata effect of a final federal court judgment applies to all state claims which could have been raised under pendent jurisdiction. A plaintiff cannot maintain a second action in state court on the same transaction in which he attempts to advance a state law theory earlier omitted in a federal action. Woods Exploration & Pro. Co. v. Aluminum Co. of Amer., 438 F.2d 1286 (5th Cir. 1971); cert. den. 404 U.S. 1047 (1972); McCann v. Whitney, [25 N.Y.S.2d 354 (Sup.

> Ct. 1941)]; Brady v. Trans World Airlines, Inc., 274 A.2d 146 (Del. Super. Ct. 1971), aff'd. 282 A.2d 620 (Del. 1971). Only where it is clear that a federal court would have refrained from exercising pendent jurisdiction over the state claims, such as where a jurisdictional bar operates, or where the federal court has exercised its discretion not to hear them, will those state claims not be barred in a subsequent state court suit. Pope v. City of Atlanta, 240 Ga. 177, 240 S.E.2d 241 (1977); aff'd on reh. 242 Ga. 331, 249 S.E.2d 16 (1978); cert. den. 440 U.S. 936 (1979). Id., 63 Haw. at 437-438, 629 P.2d at 1122-1123 [Footnote omitted]. Id., pp. 8-9.

The three criteria stated in Hall v. State, supra, are met herein: the issues are identical, there has been final judgment on the merits, and the party against whom res judicata is asserted was a party in the previous proceeding.

In regard to the "same cause of action" requirement, it is to be noted that the amended complaint transfers in toto all claims put before the federal District Court, in the form of 12 episodes

considered by Fong in his decision.

Moore's Federal Practice states:

> Generally, it has been held that the "cause of action," or "claim," as it is referred to in the Restatement (Second), is bound by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies. . .
>
> The claim or cause of action is not bounded, then, by the source of the legal obligation, by the relief that is sought, or by the evidentiary facts. . .
>
> The present trend is undoubtedly in the direction of requiring that a plaintiff present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence. The Restatement (Second) defines a "claim" for res judicata purposes to include all rights of the plaintiff to remedies against the defendant arising out of the same transaction or "series of connected transactions". Moore's Federal Practice, par. 0.410[1], pp. 350, 354, 359-360. [Emphasis added.]

Thus, while Complainant advances a different theory before the Board, i.e.,

prohibited practices under Section 89-13, HRS, than that put before the federal district court, i.e., allegations of Federal Civil Rights violations, res judicata applies as the same transaction in the form of the alleged 12 episodes, is involved. The Hawaii Court of Appeals is in accord, as Hall v. State, supra, provides:

> The supreme court found that the claims in Silver were the same in both the federal and the state case, the plaintiff having alleged in both cases that the defendants engaged in a conspiracy spanning ten years to unlawfully deprive him of his right to practice medicine. Additionally, the supreme court held that the fact that the state case included the state statutory claims not included in the federal case did not relieve the plaintiff of the res judicata effect of the federal judgment. Both complaints were aimed at the same conspiracy and the state statutory claims were merely "alternate theories or claims arising from a single injury[,]" and should have been raised in a single action. Silver, 63 Haw. at 437, 629 P.2d at 1122. With Silver's holding in mind, we examine the claims and issues in this case. Hall

v. State, supra, Civ. No. 86-1646, p. 9.

However, Complainant has a stronger case in arguing that the Kauai Circuit Court's confirmation of the arbitration award and the denial of the motion for consideration thereof have no res judicata effect. The prohibited practice in which Complainant claims a conspiracy was, in fact, not before the arbitrator. Neither were Episodes 1 through 10 before the arbitrator. However, it should be noted that at p. 16, ff, of the arbitration decision, the arbitrator notes that the prior disciplinary record of Complainant was placed into evidence and thus it must be presumed to have been considered in the decision.

Complainant also is correct in his argument that Hirano's judgment confirming the arbitration decision was issued subsequent to the filing of the prohibited practice complaint with this Board.

However, though the judgment of the Kauai Circuit court was issued subsequent to the filing before this Board, it was issued previous to this Board's final determination on the complaint filed with the Board. Thus, the Kauai Circuit Court's judgment is a prior determination in terms of a final adjudication. This issue, however, warrants no determination in light of the apparent res judicata effect of the federal decision.

The issues Complainant wishes to relitigate before the Board received a full hearing in federal court, precluding him from relitigating what are essentially the same issues before the Board, and subjecting Respondents to a further burdensome need for defense.

IV. CONCLUSION

The standard for a motion for summary judgment has been met, as all issues of

fact were presented, addressed and passed on in federal court. Since matters outside the pleadings are considered herein, summary judgment rather than dismissal is appropriate. Hall v. State, supra, p. 7. This is appropriate even though Kauai County entered a Motion for Dismissal, as when matters outside the pleadings are considered, the motion to dismiss becomes one for summary judgment. Au v. Au, 63 Haw. 210, 212, 626 P.2d 173, 176, aff'd. on recon., 63 Haw. 263, 626 P.2d 181 (1981); Towse v. State, 64 Haw. 624, 628, 647 P.2d 696 (1982). Summary judgment is granted for both Respondents to the instant action.

DATED: Honolulu, HI, Nov. 1, 1988.

HAWAII LABOR RELATIONS BOARD

_____

MACK H. HAMADA, Chairperson

_____

JAMES R. CARRAS, Board Member

_____

GERALD K. MACHIDA, Board Member

RONALD R. CALDEIRA and TONY T. KUNIMURA, Mayor of the County of Kauai and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO

CASE NOS.: CE-03-97, CU-03-50

ORDER NO. 714

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Copies sent to:

Robert A. Smith, Esq.
Charles K.Y. Khim, Esq.
Warren C.R. Perry, Second Deputy County Attorney
Joyce Najita, IRC

Honolulu, Hawaii

December 22, 1988

Ms. Cathy Catterson
Chief Clerk
United States Court of Appeals
for the Ninth Circuit
P.O. Box 547
San Francisco, California 94101

Re: Ronald Caldeira v. County of Kauai et al., Docket No. 87-2959

Dear Ms. Catterson:

This letter is a joint letter to the Ninth Circuit, submitted by all counsel involved in the above appeal, which was argued on Friday, November 18, at 8:30 a.m. Hawaii, before a Ninth Circuit panel consisting of Judges O'-Scannlain, Chambers, and Trott,. There has been a factual development in the case which is not part of the record on appeal but which must, all counsel agree, be brought to the attention of the court.

The case involves the question whether plaintiff-appellant Ronald Caldeira can maintain a section 1983 and section 1985(3) Civil Rights action with respect to his discharge from employment by

defendant-appellee County of Kauai, State of Hawaii, when he took his discharge to arbitration, the arbitrator sustained the discharge, and the arbitration decision was confirmed by a judge of the Hawaii State court system. The District Court held, among other things, that on these facts, Caldeira's section 1983 action was precluded and granted summary judgment in favor of defendants.

The record on appeal shows that Caldeira, in addition to taking his discharge to arbitration, also filed a "prohibited practice" (unfair labor practice) complaint with Hawaii's Public Employee Relations Board, since re-named the Hawaii Labor Relations Board, over his discharge and the subsequent arbitration. Caldeira claimed, among other things, that his labor union, defendant-appellee Hawaii Government Employees Association (HGEA), had not represented him fairly during the arbitration, and that his former employer had unfairly discharged him.

What the record on appeal does not show is that on November 1, 1988, a few weeks before oral argument of the appeal, the Hawaii Labor Relations Board decided

Caldeira's prohibited practice complaint adversely to Caldeira, granting motions by the County and the Union for summary judgment. A true copy of that decision is enclosed with this letter. Caldeira will not be seeking review of that decision in the Hawaii state court system or elsewhere.

All counsel in the case are in agreement that this decision must be considered by the Court in ruling on the preclusion issue, in light of the United States Supreme Court's decision in University of Tennessee v. Elliot, 478 U.S. 788, 92 L. Ed. 2d 635, 106 S. Ct. 3220 (1986). The United States Supreme Court there held that even unreviewed state administrative decisions had preclusive effect on section 1983 actions, although not on Title VII actions, stating:

> Accordingly, we hold that when a state agency "acting in a judicial capacity ... resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," Utah Construction & Mining, supra, 384 U.S., at 422, 86 S. Ct., at 1560, federal courts must give

> the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts.
>
> 106 S. Ct., supra, at 3227.

Moreover , the Ninth Circuit in Plaine v. McCabe, 790 F. 2d 742 (9th Cir. 1986) adopted the holding in Elliot that an unreviewed administrative agency's decision is entitled to res judicata effect under the Full Faith and Credit Statute.

The parties did not bring to the panel's attention at the time of oral argument the fact that the Hawaii Labor Relations Board had ruled on November 1. Nor did the parties cite the panel to the Elliot decision either during oral argument or in any of the briefs.

In the circumstances, the parties jointly apprise the Court of these developments by means of this letter, and ask the Court for guidance as to how the Court wishes the parties to proceed. Although the parties will of course have differing views as to the impact of the Hawaii Labor Relations Board decision on the appeal, and as to the meaning and reach of Elliot, they are in agreement that the

Court must know of the developments set forth in this letter.

Yours very truly,

s/ Robert A. Smith
Attorney for Ronald Caldeira
Plaintiff-Appellant

s/ Charles K. Y. Khim
Attorney for HGEA
Defendant-Appellant

s/ Warren C. R. Perry
Attorney for County of Kauai
Defendant-Appellee

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RONALD CALDEIRA)	CIV. 85-0869
)	
Plaintiff)	PLAINTIFF'S
)	TRIAL MEMO-
v.)	RANDUM PART
)	I (THE FACTS)
COUNTY OF KAUAI)	EXHIBIT A;
et. al.,)	CERTIFICATE
)	OF SERVICE
Defendants)	

PLAINTIFF'S TRIAL MEMORANDUM
PART I (THE FACTS)

I.
Preliminary Statement

This trial memorandum sets

forth the evidentiary basis for Plaintiff Ronald[1/] Caldeira's theory of the case--that the Union, well knowing the intention of County officials to railroad Plaintiff out a job, acquiesced in the plan and conspiracy rather than fight it. The evidence will show that the Union, well-knowing the County's intentions, crossed over the line from passive acquiescence into

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1/ The parties refer to each other by first names and will undoubtedly testify in that manner. Accordingly, this memorandum will do likewise. Thus Plaintiff Ronald Caldeira will be referred to as "Ronald". Defendant County of Kauai will be referred to as "County"; and Defendant Hawaii Government Employees Association will be referred to as "the Union".

active conspiracy, joining with County officials to bring about Ronald's discharge.

The case breaks down into 12 different episodes, each one of which involve a separate "move" put on Ronald by County officials to build up a record against him of alleged misfeasance. The Union was not involved in the first two episodes but became involved with the third episode.

(1) THE DEVELOPING CONFLICT BETWEEN ISAAC HOOKANO AND RONALD (NOVEMBER 1978-OCTOBER 1979).

Plaintiff Ronald Caldeira, who was born on May 4, 1956 in Lihue, of Portugese ancestry, was employed by the County on January 13, 1978 as lifeguard

(Recreation Assistant II)

[1][2/] at a salary of $788.00

per month. He was assigned to

2/ During discovery, Plaintiff's counsel assembled a documents file consisting of documents from Plaintiff's own files together with documents from the Union's files and the County's files, obtained through requests for production of documents. During depositions on Kauai in March 1986, Plaintiff delivered to both the Union and the County an integrated set of the documents, all in chronological order, from the beginning of Plaintiff's employment through the end. These documents were all page numbered with a numbering machine, numbering 798 pages in all. In depositions, the parties have utilized, not separate exhibit numbers to demark these documents, but rather the machine-numbered pages of the set of documents supplied by Plaintiff. The citations herein follow the same reference system. That is, unless otherwise indicated, the bracketed page numbers refer, not to exhibit numbers, but rather to the machine-numbered numbered pages on these documents. The documents have been submitted to

the Kapaa Pool.[3/] The first nine months of Ronald's employment were uneventful; and on July 27, 1978, Ronald received a "satisfactory" Job Performance Report ("JPR") from the County [12.1].

On November 18, 1978, an event ocurred which resulted in huge conflict between Ronald and his immediate supervisor, Defendant Isaac Hookano (nicknamed "Liko", and hereinafter referred to by that name). On

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2/ CONT'D the Court in a formal submission filed concurrently herewith. For the convenience of the Court, the specific documents referred to in this memorandum are attached hereto.

3/ There are two other pools on Kauai, the Waimea Pool and the Kekaha Pool. Ronald never worked at either of those pools.

that date, Liko gave Ronald a letter [13] admonishing him to take better care of the bathrooms at Kapaa pool. Scott Yatsuoka, a part-time lifeguard hired on a contractual basis, came on duty after Ronald's shift was over or on Ronald's days off and had cleaned the bathrooms. Liko's letter to Ronald praised Scott's performance as an example which Ronald should follow. Liko, for signature on the letter, wrote in Scott's name, his name, and the names of all other lifeguards "and all the staff." He left the letter at the pool for Ronald to read. It is Liko's testimony that Scott got to the letter before Ronald received it and added a P.S. reading

"stay hot!" and then a P.S.S. reading: "Turn over, spread your legs, and Kiss It good by." [13]. It is Liko's testimony that he did not know about these postscripts until Defendant Ray Emura ("Ray"), Acting Kauai Division Chief of the Union and Ronald's business agent and union representative, called him about it. Liko's testimony is, further, that thereafter both he and Scott apologized to Ronald.

The letter, however, enormously insulting as it was, left a lasting impression on Ronald. It resulted in huge conflict between Ronald and Liko in which County management, through Defendants Wilson Miyashiro and Gordon Shibao,

sided with Liko against Ronald.[4/] This conflict flowered into many disputes over how well Ronald was doing his job, as noted in Ronald's 08/05/79 letter to Liko [31] which itemizes Ronald's never-ending request for supplies. This growing conflict led up to Ronald's first reprimand letters (08/30/79 from Wilson [39-46] and 10/4/79 from Liko [56-60]) criticizing the condition of the pool. From this point on,

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4/ Defendant Wilson Miyashiro ("Wilson") was Director of Recreation, Department of Public Works, for the County of Kauai, and was Liko's immediate supervisor. Defendant Gordon H. Shibao ("Gordon") was Superintendent of Parks & Recreation, Department of Public Works, for the County of Kauai, and Wilson's immediate supervisor.

the County constantly accused Ronald of never taking care of the pool, the surrounding lawn, and the bathrooms, which the County claimed were chronically in a deteriorated condition. Just as constantly, Ronald's reply to this accusation was that he was not furnished with sufficient or adequate supplies with which to take care of the pool, its lawn, and its bathrooms. In proof of this, Ronald will offer in evidence his monthly reports, which are forms that Ronald was to turn into the County each month, on which Ronald listed the equipment and supplies he needed for proper maintenance of the pool, lawn, and bathrooms. For example, Ronald's September 1979 monthly activity report requested soda ash, reagent 2, rake, hoe, razor blades, Decalite, a wrench, pliers, tools, block (a large scouring block), and a weeder, and also requested that the lawn-mower be fixed [46.1]. Ronald will offer expert testimony that if the County chronically failed to supply these tools and materials, then it was not possible for Ronald to keep the pool, lawn, and bathrooms in well-maintained condition.

On April 17, 1979, midway along in the evolution of this conflict, Liko gave Ronald a "not quite satisfactory" JPR [16.1]. The JPR also reflects

that the County approved a raise in pay from $788.00 per month to $824.00 per month. At year end, on December 24, 1979, Liko upgraded Ronald's JPR to "satisfactory" despite the earlier reprimand letters [97]. Ronald's salary was continued at $824.00 per month.

(2) THE WATER SAFETY "SET UP" (JANUARY-MAY 1980).

The County, through Gordon, then engaged in an obvious scheme and artifice to impeach Ronald's credentials as a lifeguard, viewing this as possibly a way to sustain disciplinary action against Ronald. This episode started when Wilson and Gordon requested Ed Webb of American National Red Cross to conduct a pool check of Ronald's life saving skills. This is reflected in Ed Webb's letter to Ronald of 1/28/80 [106-107].

Webb thereafter asked Ronald to hold up on teaching life saving classes until his skills could be checked [102-104]. Ronald justified his skills and passed the test [109-116].

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(3) THE TWO-DAY SUSPENSION OVER TIME SHEETS (JUNE 1980).

In a 12/5/79 memo [89-90], Liko gave Ronald three working days in which to turn in his time sheets. Yet on 4/21/80, Liko requested that Gordon suspend Ronald for three working days because Liko had told Ronald on April 15 to turn in his time sheet that day and Ronald had refused [126]. Liko retracted this disciplinary request in a 04/25/80 memo to

Gordon admitting that he had over-reacted [127]. In June, however, Liko, Gordon and Wilson went back to the same theme. Liko appealed to Wilson for help [131] on June 6; and on June 9, Wilson appealed to Defendant Henry Morita ("Morita"), who as County Engineer was Gordon's supervisor and head of the Department of Public Works, advising Morita that on June 3, Gordon had told Ronald to submit his time sheet by 9:00 a.m. the next day, an instruction which Ronald refused, thereby committing insubordination. Wilson therefore asked Morita to impose a 3-day suspension [137-138]. Gordon joined in

this request on June 13 [139-140] in a memo to Morita approved by Clay Kagawa, Deputy County Engineer, dated June 13 [139-140]. Morita on June 16 imposed a 2-day suspension on Ronald for failure to turn in time sheets as ordered on June 3 [144].

Wilson's June 9 memo to Morita requesting the 3-day suspension was sent to the Union; so as least from this day forward, the Union was on notice of the move to impose the 3-day suspension [137]. Ronald had also learned of it, even earlier than that, and on the morning of June 8 contacted the HGEA office. Both Ray and Ray's immediate superior, Defendant Clarence M. Takashima

(nicknamed "Gadget" and hereafter referred to by that name), Kauai Division Chief of the Union, were gone; and on that day, June 8, Ronald filed a formal protest over lack of Union representation, believing that he was facing a 13-day suspension [135]. This marks the first date on which the Union failed to act on Ronald's behalf. The Union never grieved the suspension.[5/]

(4) THE ABORTED FIVE-DAY SUSPENSION (JUNE-JULY 1980).

5/ In answer to the request for admissions, the Union states that, while it filed no written grievance, it did file a verbal grievance. The collective bargaining agreement between the Union and the County does not recognize a verbal grievance, and therefore there was no grievance at all.

Ronald normally worked from 9:00 a.m. to 5:00 p.m. On 6/25/80, Ronald was presented with a work schedule change advancing his starting and stopping times by one hour from 8:00 a.m. to 4:00 p.m. [153]. Ronald, by this time suspicious of anything which the County requested him to sign, refused to do so. However, although he refused to sign, he did change his workday to the new hours and thus left work at 4:00 p.m. When Liko discovered that Ronald had left the pool at 4:00 p.m. (without signing the change form), Liko reported the incident to Wilson and Gordon, requesting that they discipline Ronald for leaving his assigned station without authorization!

[163] Wilson and Gordon thereupon memo'd Morita recommending a 5-day suspension on this ridiculously technical rap [164]. Lillian Takeguchi ("Lillian") a County secretary for Wilson or Gordon,[6/] drafted a 5-day suspension letter on July 11 [165] which Gordon initialled that day and Herbert Doi ("Doi"), County Personnel Director, reviewed and approved on July 16 [165]. However, Morita on July 22 cancelled the letter, although done in final form [175], because (he felt) there had been no official notice to

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6/ Lillian Takeguchi used her initials ("lit") on letters or memoranda which she typed.

Ronald changing his working hours [176]. While Doi thought it was not necessary to get Ronald's signature on the work change form, Morita decided that the "problem" might be better handled if Ronald were placed directly under Wilson's supervision and not Liko's [176]. By this time Wilson had utterly taken Liko's side, as witness his attempt to get the Kauai police department to change its police report on Ronald's complaint that Liko had threatened him [158-160].

Thus the 5-day suspension over the change in working hours was cancelled and never went into effect. But Gadget was notified by the County that the 5-day suspension was in the

works when he was given a copy of the draft 5-day suspension letter or otherwise learned of it. (The HGEA is shown as being copied on both the July 11 draft letter [165] and the July 18 final form letter [175]). For in Ronald's memo to Gadget of July 18 [172], he recites that he saw Gadget on July 16 when he requested a grievance on the 2-day suspension, and that Gadget at that time informed Ronald of the 5-day suspension in the works and laughed and said "I am going to sit back and laugh when you get fired." [172].

Thus, the Union not only did not grieve the 2-day suspension but did not grieve the threatened 5-day

suspension.7/ Even though the 5-day suspension was later aborted by Morita, still the Union knew of it and knew, at this point, that Liko, Wilson and Gordon, were involved in a plot to get Ronald fired. The Union thus knew that the threatened 5-day suspension was a part of this plot and should have grieved it even though it was cancelled. Instead, the Union welcomed it, Gadget thus demonstrating his complicity in the plot.

7/ In answer to the request for admissions, the Union claims to have filed a written grievance over Liko's threat of bodily harm and over the threatened 5-day suspension; but there is nothing in writing in the documents that supports this claim.

(5) THE JPR RATING OF "UNSATISFACTORY" (JANUARY 1981).

On 1/12/81 Ronald was given an "unsatisfactory" JPR [194-196]. With this "unsatisfactory" JPR, Wilson commenced the next move on Ronald, this time recommending a 5-day suspension for various assorted acts of misfeasance and nonfeasance [198-200]. The HGEA got a copy of this letter [Id.]. Ronald, in his 3/12/81 memo to Ray, requested a grievance over the JPR and over two other matters as well [211-212]. Ray, in his reply letter of 3/24/81, addressed the two other matters but not the JPR [215]; and the Union never did grieve the JPR.

(6) UNION ACQUIESCENCE IN THE TEN DAY SUSPENSION (MAY-SEPTEMBER 1981).

On 2/23/81, the pool was closed for major repairs to filtration system. Then Ronald was on sick leave for one month (from 3/30/81 to 5/2/81), when he went to Honolulu for eye treatment.[8/] The pool did not reopen until he returned after May 2 and was thus closed during March and April. On Ronald's return, the County launched a major effort to discipline Ronald for all of the ills of the pool, an effort resulting in a tremendous flood of "documentation", pool proce-

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8/ Ronald was in a car crash in 1971 when he was fifteen, which left him blind in the left eye [9].

dure memos, diagrams, and instructions on water chemistry [see 216-265][9/] Gordon's 05/06/81 memo to Wilson [224], directing him to proceed against Caldeira and make recommendations and justifications and supply documented backup, was then followed by Wilson's 05/12/81 six page memo to Morita detailing events of the first two weeks in May [231-236].

While the Union did not get copies of these two memos, it did get copies of much of the detailed memos which thereafter

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9/ The Kapaa pool was some 20 years old. Two years later its filtration and chlorination system was completely replaced, one of its real problems thus being old age [592, 594, 641, 743, 744].

emanated in the effort to "document" Ronald's transgressions. Thus the Union was sent copies of Wilson's memo to Ronald of 05/13/81 to submit a detailed report on the terrible pool condition of 05/5/81 [239]; Ronald's response [240]; Wilson's 05/15/81 memo to Ronald branding Ronald's reports as unsatisfactory and requiring more reports [242-243]; Ronald's answer [247-252]; and his supplemental report on daily activities [252]. Wilson's (and Gordon's) memo of 5/15/81 [242-243] in particular blamed Ronald for causing the pool to look like a "cesspool" and for deliberately sabotaging the pool--"doing things

deliberately so the pool must be closed." This memo threatened Ronald with dismissal if he failed to supply the reports Wilson was demanding; and in all Ronald was being subjected to incredible pressure and harrassment, with his job clearly in danger. The Union cannot have been under any doubt as to the effort being mounted against Ronald here.

On 05/18/81, Wilson and Gordon wrote Morita recommending a 10-day suspension [253-256]. Ronald grieved against Wilson by letter of 05/31/81 (three grievances in all) [275-276]. The grievances were most serious, as Ronald was

complaining that two days earlier Wilson had filed a complaint with the police against Ronald for harrassment, and that the police were looking for him [see 305]; also, Ronald charged that he had not received sufficient on-the-job training at the Kapaa pool and that Wilson was attempting to hold him to the knowledge of an engineer and not simply a lifeguard in his accountability for the condition of the pool. The Union did not process these grievances, and Ray told Ronald that he would have to proceed on his own! Later Ronald was denied a hearing on these grievances because of improper procedure [289].

The move against Ronald continued unabated; and on 06/05/81 Morita imposed a 10-day suspension, also threatening dismissal [282-283]. The Union was copied. Ronald then grieved to Ray, requesting arbitration if he was suspended [284].

The Union was prodded into activity by Ronald's 06/08/81 letter to Defendant John E.K. Akana ("Akana"), the Union's Deputy Executive Director, filing an internal protest with the Union over lack of proper Union representation. In response, Akana assured Ronald that the Union would fight his suspension [292]. Gadget then, on 06/18/81, wrote a three page letter rebutting Morita's 06/05

letter point by point, protesting the suspension, and asking that it be rescinded [293-295]. On 06/19/81, Morita kept in place one day of suspension (for 06/17/81) but deferred the other nine days [302]. Earlier, on 06/12/81, however, Gadget met with Gordon and Morita. They agreed that Liko would be put back in place as Ronald's supervisor! [303]. This was not only Union acquiescence in the move to oust Ronald; it marked a certain point by which time (at least) the Union joined the conspiracy.

The grievance over Ronald's suspension then proceeded up the various steps of the grievance procedure [307]. The

Step 2 meeting was held on 07/01/81; and Morita wrote Gadget on 07/08/81 of a proposed disposition involving reduction of the 10-day suspension to five days and certain other assurances and stipulations [323-324]. Gadget requested Step 3 [326]. Following a meeting with Mayor (and Defendant) Eduardo E. Malapit ("Malapit") on 07/20 [327], Malapit agreed with the previous management disposition but amended it to defer the additional five days of suspension until 06/30/82 provided Ronald complied with the various conditions and requirements--in the main to obtain a "satisfactory" JPR [323]. The stipulations and

conditions required that the County furnish

> ...all necessary supplies, tools, and equipment...so that the employee can adequately service, maintain, and operate the Kapaa swimming pool to acceptable standards.
>
> [323].

Ronald protested Malapit's decision and requested arbitration [334]. Ray, however, refused, saying that arbitration was not available [335]. As the Union had thus abandoned Ronald at this point, Ronald then by himself tried to have a Step 4 hearing with the Mayor and then go to arbitration [337-338]. In his letter of 08/11/81 to Defendant Charles "Chester" Kunitake ("Kunitake"), Contracts Officer

of the Union, Ray advised that the Mayor's disposition reflected an "agreement" between the Mayor and the Union which gave Ronald "a break" [339]. On 08/27/81, Gadget wrote to the Mayor, acknowledging that the Mayor's disposition was accepted by the Union. Gadget said:

> ...the HGEA accepts the provisions set forth in [your] letter. The decision is equitable and it is our sincere desire to uphold the understanding we have jointly reached.

Here, then, the Union chose to accept a compromise rather than do what the grievant wished, even though that compromise left a 5-day suspension on his record.

The Union's abandonment of

Ronald had a fatal effect on Ronald's attempt to take his suspension to arbitration. Ronald wrote to the Hawaii Public Employment Relations Board ("HPERB"), now re-named the Hawaii Labor Relations Board, requesting the names of five arbitrators [342]; and HPERB submitted five names [346]. On 09/17/81, however, Ronald was advised by a deputy county attorney that the County would not go to arbitration because only the Union (and not Ronald) could do so and that Union had agreed to the County's grievance disposition at Step 3 [359].

The Union's complicity in the conspiracy is made even clearer by a meeting held on

9/3/81, at which Gordon, Wilson, Liko, Ronald, and Gadget were present. Minutes for the meeting were transcribed and initialed ("lit") by Lillian Takeguchi [354-355]. Liko was now back in the chain of command, and the battle continued unabated, with Ronald filing more grievances, this time over the unavailability of a lawn mower to do the mowing [349-352]. After the formal part of the meeting concluded, Gadget met informally with Morita and Gordon. Again Lillian took minutes or notes. As her notes reflect, Gadget said that the Union's position with Ronald was that he had no grievances; and Gadget recommended to the

County that it respond to Ronald that there would be no further hearings held on his grievances, and that Ronald was "on his own."

The Union may claim that Ronald's grievances were petty, but any such claim misses the central point: Ronald was under siege. A disciplinary record, necessary under the theory of progressive discipline to sustain a discharge, was inexorably building. Yet the Union agreed to a 5-day suspension and advised the County that it was abandoning Ronald, telling the County that the County should not honor his grievances by giving him hearings!

(7) THE SUMP PUMP "INCOMPETENCE" CHARGE (OCTOBER-NOVEMBER 1981).

On the heels of the 10-day suspension, Wilson, continuing his efforts to document Ronald's misfeasance, issued a lengthy memorandum concerning an incident involving the sump pump on 10/17/81, and the backup of water in the pump, leading to poor water clarity and particles in the pool, and requiring repair of the filtration system [404-406]. In the course of the fallout over the 10/17 incident, Ronald was blamed for using too much soda ash and failing to follow diagnostic procedures to determine proper pH. A pool shutdown was necessary to resolve the problems. On 10/20

Gadget grieved over Wilson's charge that Ronald caused the problem [410]. Wilson's memoranda of 10/21 [411-413], 10/26 [415], 10/29 [418-421], 10/31 [422-423], and 11/01 [426] all faulted Ronald for various transgressions in following proper pool procedure, whether chemical or mechanical. On 10/31,Wilson visited the pool on four separate occasions to make sure that Ronald was complying with minute orders which Wilson had given him, the net effect of which was to place Ronald under surveillance and subject him to harrassment. On 11/9, Wilson memo'd Morita indicating that events of the last two weeks demonstrated Ronald's incompetence [427].

In response to the Union's grievance, a meeting was held on 11/10 between Ronald, Gadget, Ray, Gordon, Liko, and Wilson [see 429]. The purpose was to discuss Ronald's charge that Wilson had accused him of incompetence. Wilson's memorandum to Morita stated that at the meeting this grievance was "resolved whereby no such accusation was made." [429].

The Union may claim that it thus went to bat for Ronald, filing a formal grievance and then "resolving" the grievance by winning a concession from Wilson that he never accused Ronald of incompetence. But Wilson's memorandum was merely one to his superior, Henry Morita. There needed to be a

formal retraction in a communication from the County to the Union or to Ronald, expunging the accusation from Ronald's personnel file. There is no such document in Ronald's file, nor was it purged. And so the Union never remedied the wrong.

(8) THE "NEAR-DROWNING" INCIDENT AND THE 20-DAY SUSPENSION (NOVEMBER-DECEMBER 1981).

On November 11, 1981, an incident ocurred at Kapaa Pool of alleged "near-drowning".[10/] On this date, a four-year-old

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10/ The facts and evidence set forth concerning this incident are taken from the published HPERB decision in Caldeira v. Malapit, et. al., Case Nos. CE-03-80 and CU-03-45, Decision No. 196, 3 HPERB 523 (1984). A true copy of this decision is attached as Exhibit A.

boy, Ryan Paik, had a swimming lesson and remained in the water after the lesson was over. According to his mother, Sharon Paik, he began struggling to stay above water. When she looked to Ronald for help, Ronald had not noticed and was too far away; so she jumped into the pool to help her son, later claiming that he had "almost drowned."

Following a report of this incident to Gordon, Gordon talked to Paik, and Wilson talked to Paik. Liko interviewed Ronald and Dennis Baretto, an adult present in the pool at the time of the incident. Wilson came to the conclusion that a "near-drowning" had occurred of

which Ronald had been oblivious, this amounting to a dereliction of duty [3 HPERB 523, 529].

Thereafter, Ronald was summoned to Gordon's office on December 29, 1981, to discuss the incident. Gadget accompanied Ronald but told Ronald, just before entering Gordon's office, that Ronald was "on his own" and that Gadget "could not help" him. [Id., 530]. After the meeting, Morita, on January 13, 1982, notified Ronald that he would be suspended for 20 days for "negligence and dereliction to duty" [Id., 530]. The letter also warned Ronald that further insubordination or dereliction of duty would result in

dismissal.

Gadget then called for an informal step grievance hearing, which took place on January 18, 1982, at which time the County produced its evidence (investigative reports and documents) [Id., 531]. After the informal step meeting, Ronald told Gadget to grieve the suspension further; but Gadget said that he would not do so and that Ronald would have to grieve on his own [Id., 531]. The next day, January 19, 1982, Gadget and Ray recommended to Ronald that he not contest the discipline, agree to demotion, or allow the Union to negotiate a reduction in suspension [Id., 531). The Union accepted the County's

evidence as true without independent investigation [Id., 531-2]. Gadget did not personally interview any witnesses [Id., 531].

On January 19, 1982, Ronald wrote to Morita protesting the 20-day suspension [451-452 (HPERB, pp. 531-2)]. Gadget, by letter of 01/28/82 to Ronald, formally advised that the Union was not assisting him in grieving the 20-day suspension [452-454 (HPERB, pp. 533-4)]. Ronald, upon receipt of this letter, went to Honolulu and hired legal counsel on February 4 or 5, 1982 [HPERB, p. 535]. Acting upon the advice of counsel, Ronald then requested an extension of time to file a

formal grievance, which the County denied, and then requested Step 2 and Step 3 hearings, which the County denied [HPERB, pp. 536-7]. Ronald's counsel then wrote both the Mayor and the Union, requesting arbitration; but on April 21, 1982, Defendant Davis Yogi ("Yogi"), the Union's Contracts Specialist, replied by letter that the Union would not pursue arbitration [HPERB, p. 537].

Thereupon, on July 21, 1982, Ronald, through counsel, filed a complaint with HPERB alleging that both the Union and the County had engaged in "prohibited" (unfair) labor practices--the County by improperly disciplining him and

then refusing to process his grievance and the Union by failing to provide him with adequate representation [HPERB, p. 524]. Hearings were held on Kauai on April 28 and June 21, 1983, at which HPERB took oral testimony and received written evidence [HPERB, p. 525]. On August 17, 1984, HPERB rendered its decision. Caldeira v. Malapit, et. al., Case Nos. CE-03-80 and CU-03-45, Decision No. 196, 3 HPERB 523 (1984).

HPERB found that the Union had abandoned Ronald and failed to provide him with adequate representation in that, among other things, the Union had failed to make an independent investigation of witnesses' accounts of the "near-drowning"

incident, recommending that Ronald acquiesce in the 20-day suspension [HPERB, pp. 538-543]. HPERB also ruled that the Union had further breached its duty of fair representation owing to Ronald by failing to advise him of applicable dates and deadlines governing the filing of grievances [HPERB, pp. 543-546]. HPERB was required to dismiss the "prohibited practices" charge against the Union because it was not timely filed within 90 days of the occurrence under H.R.S. §89-14 and H.R.S. §377-9(1) [HPERB, pp. 546-548]. However, HPERB went on to find that the County had violated H.R.S. §89-13(a)(8), which makes

violation of the terms of a collective barganing agreement a "prohibited practice", by refusing to process Ronald's grievance over the 20-day suspension [HPERB, pp. 548-551]. HPERB therefore ordered the County to afford Ronald access to the grievance procedure at Step I [HPERB, p. 552]. HPERB further ordered that if the grievance remained unresolved through Step III, the Union, if so requested by Ronald, should take the case to arbitration and "take into full consideration the findings and conclusions in this decision in considering this request." [HPERB, p. 552].

(9) THE NEXT "UNSATISFACTORY" JPR (JULY 1982).

A condition of the "deal" worked out between the Union and the Mayor was that Ronald receive a "satisfactory" JPR. When it came out on 01/14/82, it was "not quite satisfactory" [444-445]. Ronald grieved it on 04/01/82 [469]. A month later, he also grieved against Liko for not delivering supplies for several months [477]. Then on 07/13/82 he grieved against Wilson concerning alleged lack of permission to run Red Cross classes [481]. On 07/29/82 Wilson recommended a 4-day suspension to Morita over the "not quite satisfactory" JPR [484]. That is, the

recommendation was that the additional 4-days, previously held in abeyance per the Mayor's 07/29/81 letter, now be imposed, Gordon signing approval [484]. On 8/5/82 Ronald filed two more grievances, one over the fact that the Mayor's deferred date of 06/30/82 had long since passed [327-332]. On 08/09/82 Ronald grieved the failure of the County to give him supplies as requested in his monthly reports and as promised to him in the "deal" with the Mayor [see 321-324, 329-332]. Following a meeting held 08/25/82 between Ronald, Ray, Gordon, Wilson, Liko, and Morita concerning the additional 4-days of suspension [488], Morita, on 08/27/82, imposed the

extra 4-days, suspending Ronald from 09/12 through 09/15 [493]. Following a Step 1 meeting [498, 501],Ray informed Ronald that no Step 2 grievance would be pursued and that the imposition of the additional 4 days was valid, accepting the word of Gordon and Wilson that Ronald had received all supplies [503-505]. Thus the Union again abandoned Ronald and did not pursue this grievance or the others which Ronald was filing.

(10) OUSTER OF RONALD FROM KAPAA POOL (TAKEOVER BY PHILIP KEKAHU AND DEMOTION OF RONALD TO YARDMAN) [MARCH 1983 ON].

In January 1983 Defendant Philip Kekahu ("Philip") and David Kagawa were assigned as lifeguards to Kapaa Pool [578].

Their names begin to appear on station daily logs in March [540-544, 550-551]. In May, the pool was closed for renovation, while new pumps were installed. On 5/19/83, Ronald wrote to Mayor Defendant Jessie K. Manlapit ("Manlapit"), then the Union's Kauai Division Chief (Gadget having retired), protesting that Philip had now become his boss in furtherance of the continuing effort to get him fired [560]. The basis for this protest was that Liko, by giving preferential assignments of work to Philip, had made him Ronald's boss. Thus, when the pool was closed for renovation and the installation of new pumps, Philip was given the new

pump manual to take home and study, whereas Ronald was not; Philip had effectively taken over the pool. On 06/09/83, Manlapit responded that Philip was not Ronald's boss and that the Union was not collaborating with the County in getting Ronald fired, advising that the Union would not process these grievances, and remitting Ronald to his internal Union remedies if he was dissatisfied with the Union's representation [564-566]. Thus on 07/18/83, Manlapit wrote Ronald that his internal appeal to the Union to file a Step I grievance was denied, and that the grievance file would be "marked closed" [584].

Manlapit's response

obviously ignored the larger picture: Philip was being eased into Kapaa pool and Ronald was being eased out. And in the weeks and months which followed, as set forth in the final episode, Philip's position as lifeguard responsible for Kapaa pool was consolidated and Ronald's ouster was complete--he was demoted to yardman. This should have been obvious to the Union (and of course it was obvious). So the Union should have fought it tooth and nail. Instead, the Union again abandoned Ronald, refusing to grieve. And again there is a central piece of evidence concerning the Union's knowing collaboration with the County

in Ronald's ouster: Manlaplit's memo to Ronald, which was sent to Ray and Higa, was also sent to Liko (a member of supervision) and appears in the County's files! Any dispute between Ronald and the Union as to whether the Union would or would not process his grievances was just that--a dispute between Ronald and his Union. It was none of the County's business to know. Yet obviously the Union felt it important to let the County know that it was playing ball and refusing to help Ronald and to give the County confirmatory evidence of that fact.

The Union did a momentary about face: On 06/17/83 Manlapit memo'd Liko of a

scheduled 06/20 meeting to hear Ronald's grievances including the assignment of Philip as Ronald's boss [571]. By this time, the first HPERB hearing had been held (04/28). Manlapit's memo to Liko took the position that Philip's assignment as Ronald's boss was a contract violation and was grievable [571]. And Manlapit apparently reiterated this position to Gordon at the 06/20 meeting, as Gordon on 07/12 drafted a memorandum to Manlapit denying the grievance as untimely [583]. However, Manlapit then reversed course; as noted by Lillian in a typewritten note appended to Gordon's draft memorandum, Manlapit called at 9:25 a.m. on

the next day, 07/13, to advise that he is "dropping this grievance" and that Gordon should not mail out the grievance denial to him as it would only "add to confusion." [583]. Here again is direct evidence of the Union's abandonment and collaboration with the County.

///

(11) THE FINAL CHAPTER: THE "CUT-CANE KNIFE" ORDER LEADING UP TO DISCHARGE (SEPTEMBER/OCTOBER 1983).

In August the pool was shut down in order that a new chlorinator could be installed at great expense and the broken pump replaced or repaired [592]. In September, Ronald's demotion to yardman became

complete. On 09/16, the new County Engineer, Defendant Lawrence Kitamura ("Kitamura"), ordered Ronald to cut the lawn with a cut-cane knife [601]. Ronald grieved [602], and Ray refused the grievance, disputing that Kitamura had given any such order [604].

After this order, the County made a tremendous effort, once again, at documenting Ronald's failure to perform--this time, showing that he did not perform subsequent orders to pull weeds, clean the bathrooms, etc., etc. Ronald is "shown how" to do these menial tasks. Ronald is given deadlines. Computations and calculations are made as to how many weeds

Ronald should pull per hour and how many feet of bathroom he should be able to clean in a given hour or day. Pictures are taken, memos are written documenting these calculations, and these pictures and computations are given to the arbitrator eventually [see 608, 609, 616-617, 618, 619, 620, 621-623, 629, 637-638, 642, 643, 674-675].

These assignments to pull weeds and scour bathrooms evidence Ronald's complete demotion. He is no longer a lifeguard; instead he is relegated to the status of gardener and yardman, while the other lifeguards (including Philip and Defendant Sid Kini) are learning the new filtration

system [see, e.g., 605, Ronald's memo to Ray requesting a grievance against Wilson for ordering him to pull weeds while assigning Philip and lifeguard Sid Kini to help with the new filter system].

On 09/26/83, Wilson gave Ronald a 3-day suspension for non-completion of various tasks and housekeeping activities (pulling weeds, cutting the grass, mowing, scrubbing the pool and shower and washrooms) [613-614]. After more of the same, all County officials met on October 11, 1983, at Kitamura's office and, with Ray present as well, determined to discharge Ronald effective November 1, 1983. Ronald was so informed verbally on that

date [635-636]. Then Kitamura followed up with a letter to Ronald recapping events, asserting that Ronald's "disregard of lawful orders issued by competent authority constitutes insubordination," and discharging Ronald effective 11/01/83 [653-658].

(12) THE ARBITRATION.

As the County was building up the evidence towards discharge, Ronald, on 10/06/83, wrote Ray requesting grievances against Wilson and Gordon over the 3-day suspension, basically protesting that he was being framed [631; see also 632]. On 10/14/83, Ray wrote Ronald that they 3-day suspension violated no contract provision and that

Ronald's grievance was denied [645]. Ronald then wrote Defendant Kunitake, the Union's contracts officer, making an internal Union appeal of Ray's grievance denial [647; see also 659, 660, 664, 665, 666, 667, 668, 669]. On 11/22/83, Defendant Davis K. Yogi ("Yogi"), the Union's contracts specialist, wrote Gordon submitting a Step 1 grievance on the 3-day suspension but requesting that Wilson hold it in abeyance until the Union could study the matter further [687, 688].

On 05/03/84, Yogi wrote Gordon formally alleging that the 3-day suspension was a contract violation [704-707]. Gordon then sustained the 3-day

suspension [718-719], so Yogi wrote Herbert Doi, Personnel Director, requesting a Step III hearing but further requesting that it be held in abeyance to await the processing of Ronald's discharge through the various grievance steps, so that the two grievances could be combined [723-725]. A hearing on both grievances was then held before Mayor and Defendant Tony T. Kunimura [725-728], who sustained the discharge by letter of 06/19/84 [729-730]. Thereafter Defendant Russell Okata, Executive Director of the Union, gave notice of intent to arbitrate [736]. The arbitration hearing was held on September 27 and 28, 1984,

before Arbitrator Stanley Ling, Esq. On January 15, 1985, Arbitrator Ling denied both grievances and sustained the discharge.

Arbitrator Stanley Ling ruled that Ronald had been deliberately dilatory in performing the menial laborers tasks assigned him and that such dawdling was tantamount to a refusal to obey orders and thus equivalent to insubordination, which was grounds for discharge. Assuming that Ronald was deliberately dilatory, the Union and its counsel, during arbitration proceedings, never made any argument to the arbitrator that because of the conspiracy against him, Ronald

was entitled to resist Kitamura's grotesque order to cut the grass around the pool with a cut-kane knife and resist his demotion, and that since all attempts to properly grieve over Ronald's situation had come to naught or were fore-doomed to failure, Ronald used the only "remedy" available to him--passive resistance. The Union and its counsel focused only on the events of September/October 1983 and the orders Ronald was given in those months, arguing that Ronald had not been insubordinate. But this was only the tip of the iceberg. The Union and its counsel made no effort to go into the whole history of Ronald's employment

relationship with the County in order to show the preceding ten incidents and episodes which had occurred. In short, the Union and its counsel made no effort to expose to the arbitrator the preceding five years of warfare between Ronald, the County, and the Union.

At the time of his discharge, Ronald was earning $1,200.00 per month or $14,400 per year [528]. Following his discharge, Ronald lost his fringe benefits, including medical coverage, retirement benefits, dental coverage, life insurance, and car insurance [689, 690, 691, 693, 694), 701]. He was forced to give up, and retransfer to the

County, a lot in the Kawaiahao Estates Subdivision, which he could no longer afford [693-694].

Following HPERB's August 17, 1984 decision on the "near-drowning" incident, the Union (long after Ronald's discharge) was able to "bargain" the County into eliminating all 20 days of the suspension [742, 747, 748, 749, 750.1, 754, 754.1, 755, 759, 764, 776, 777, 778, 786, 794, 795, 796, 797, 798]. Although Ronald, through counsel, requested the Union to seek expungement from County files of all defamatory material concerning the "near-drowning" incident, the Union made no attempt to do; and there has

been no such expungement.

RESPECTFULLY SUBMITTED this 15th day of September, 1987, Honolulu, Hawaii.

s/ Robert A. Smith
_____,

ROBERT A. SMITH,

Attorney for Plaintiff

AFFIDAVIT OF SERVICE BY MAIL

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

I, L. Richard Fried, being first duly sworn, depose on oath and state that I am a member of the Bar of the Supreme Court of the United States; and that on the 2nd day of June, 1989, a date within the time permitted, I served copies of the Appendices to Petition for Writ of Certiorari on Respondents by causing copies to be mailed in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

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Subscribed and sworn to before me
this 2nd day of June, 1989.

Notary Public, State of Hawaii
My commission expires: 10/3/89
8873A

88-1989

FILED
JUN 28
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RONALD CALDEIRA, Petitioner

v.

COUNTY OF KAUAI;
HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,
AFSCME LOCAL 152, AFL-CIO,
et al., Respondents

ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Local 152, AFL-CIO,
et al.

QUESTIONS PRESENTED FOR REVIEW

Whether the Ninth Circuit erred in giving collateral estoppel effect, pursuant to the Full Faith and Credit statute, 28 U.S.C., Section 1738, to a final state court judgment affirming an arbitration award.

Whether the Supreme Court should issue a writ of certiorari ordering that the foregoing issue be considered by that Court.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

The recitation of facts contained in the Ninth Circuit's decision herein is accurate, and is not being explicitly challenged by Petitioner. In summary, these facts are as follows:

Petitioner was employed by Respondent County of Kauai (hereinafter,

Kauai) as a pool attendant. Soon after Petitioner began working for Respondent Kauai he failed to perform his work in a proper manner, and was disciplined for it. Respondent Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO and the Respondents affiliated with the same (hereinafter collectively referred to as HGEA, et al.) were the collective bargaining representatives of Petitioner. Respondents HGEA, et al., were initially successful in having the sanctions imposed with said discipline ameliorated or eliminated.

Petitioner continued to fail to perform his job properly, and eventually was discharged from his job, despite the efforts of Respondents HGEA, et al., to prevent his discharge.

The collective bargaining agreement between Respondents HGEA, et al., and Respondent Kauai provided that, among

others, Petitioner could not be discharged from his job absent proper cause. Respondents HGEA, et al., alleged that Petitioner was discharged in violation of said clause, and a two-day arbitration hearing was conducted over said allegation. Arbitrator Stanley Ling, a graduate of University of Michigan Law School who is licensed to practice law in Hawaii, ruled that said clause was not breached because Petitioner was discharged for proper cause.

Thereafter, Petitioner brought suit in District Court alleging that Respondent Kauai and Respondents affiliated with Respondent Kauai conspired to cause his discharge in violation of 42 U.S.C., Section 1983 (hereinafter, Sec. 1983) and that Respondents HGEA, et al., allegedly joined this conspiracy in violation of 42

U.S.C., Section 1985(3) (hereinafter, Sec. 1985(3)).

Pursuant to a motion by Respondent Kauai, the arbitration award was confirmed under Hawaii Revised Statutes, Chapter 658, which provides that confirmed arbitration awards shall have the force and effect of a judicial judgment. This judgment became final when Petitioner's appeal thereof to the highest Hawaii Court was dismissed.

The District Court gave the foregoing judgment collateral estoppel (issue preclusion) effect and granted summary judgment in favor of all Respondents. The District Court also granted summary judgment to Respondents HGEA, et al., on the ground that there was no material issue of fact that they did not conspire to oust Petitioner from his job.

The Ninth Circuit affirmed the

District Court's summary judgment.

While the chronological order of the sequence of events in Petitioner Ronald Caldeira's statement of the case is generally correct, there are several inaccuracies and omissions in the actual setting forth of said events that need to be corrected.

Although Petitioner alleged in his complaint that there was a grand conspiracy formed soon after he was hired to ouster him from his job, the District Court found as a matter of undisputed fact, and the Ninth Circuit affirmed, that the Respondents proved that there was no conspiracy between Respondent Kauai and Respondents HGEA, et al., to deprive Petitioner of his job. The lower courts further found as a matter of fact, that Petitioner failed to introduce evidence sufficient to rebut this establishment of the fact that no

such conspiracy existed. The lower courts made this finding of fact in conjunction with their holding that summary judgment against Petitioner's Sec. 1985(3) claim appropriate.

Regarding the motion to confirm arbitrator's award, only Respondent Kauai made such a motion in State Court. This is contrary to Petitioner's statement that both Respondent Kauai and Respondent HGEA, et al., so moved. Contrary to Petitioner's statement that said motion was too late, the State Court found the aforesaid motion to confirm to be timely.

Prior to the granting, in open court, of Respondent Kauai's motion to confirm, the only challenge that Petitioner made thereto was that said motion was untimely; no opposition to the merits of said motion was made by Petitioner, until after the granting of said motion.

SUMMARY OF ARGUMENT

Certiorari should not be granted herein because Petitioner in his petition for certiorari has failed to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration of said petition.

Also, certiorari should not be granted herein because no important question of Federal law which has not been, but should be, settled by this Court exists herein, since the scope of minimal procedural due process has been well defined by this Court, and since the definition of what constitutes a "full and fair" hearing in the context of applying collateral estoppel in a 28 U.S.C., Sec. 1738 (hereinafter, Sec. 1738) context has been defined by this Court in Kremer v. Chem. Constr. Corp., 456 U.S. 461, 481 (1982).

Finally, certiorari should not be granted herein because the Ninth Circuit's decision herein is not in conflict with the decisions of other Circuit Courts, even assuming, arguendo, that other Circuit Courts hold that Sec. 1983 claims are "different" than State Court claims, since the Ninth Circuit applied collateral estoppel (issue preclusion) herein, and not res judicata (claim preclusion).

ARGUMENT

I. The Scope of Minimal Due Process Has Been Adequately Defined By This Court Numerous Times.

It is a long established principle of this Court, established in many cases, that writs of certiorari should be granted sparingly, e.g., Re Lau Ow Bew, 141 U.S. 583, 589 (1891). Indeed, this principle is reiterated in Supreme Court Rules (hereinafter, S.Ct.R.), Rule 17.1.

which provides that a writ of certiorari is not a matter of right, and will be issued "only when there are special and important reasons therefor."

The thrust of Petitioner's arguments are merely that the lower courts erred in the application of routine and well established principles of law to the facts in this case. Thus, it appears that Petitioner's arguments amount to no more than an appeal for certiorari as a matter of right. The only place Petitioner specifically stated in his brief the grounds for which certiorari should be granted are on pages 47 and 48 thereof. An examination of these grounds indicates that Petitioner is merely asking this Court to issue a writ of certiorari to review the Ninth Circuit's application of routine, well established doctrines to the facts of the instant matter. For example, on page 47 of his

brief, Petitioner argued that this Court should grant certiorari because in Sec. 1983 cases where Sec. 1738 is sought to be applied, the scope of minimal due process is undefined. To the contrary, as demonstrated infra, the scope of minimum due process has been well defined.

In Kremer this Court held that in Sec. 1983 cases where Sec. 1738 is sought to be applied, there will be no such application where the party against whom Sec. 1738 is to be applied did not receive a full and fair opportunity to litigate, in the state proceeding. This Court further held in Kremer that:

> "But for present purposes, where we are bound by the statutory directive of Sec. 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." id.

The minimum procedural requirements of the Fourteenth Amendment's Due Process Clause have been enunciated by this Court on numerous occasions to consist of notice, and an opportunity for a hearing, e.g., Goss v. Lopez, 419 U.S. 565, 578 (1975). Thus, certiorari need not be granted herein in order to determine what the minimum due process requirements consists of.

It appears that Petitioner is really asking that this Court reverse the lower court's application of the foregoing due process criteria of notice and a hearing, to the facts herein. This is really asking for an appeal as of right. [1] Therefore, the instant petition should be denied.

II. This Court Has Already Decided the Extent of the "Full and Fair" Requirement.

On page 47 of his brief, Petitioner argued that this Court can determine the

supposedly undecided issue of whether "the question of 'full and fair' is one of fact which must be litigated before a Sec. 1983 claim can be precluded."

As demonstrated above, this Court in Kremer already determined that for the purposes of determining whether to preclude claims or issues in Sec. 1983 cases by applying the statutory mandate of Sec. 1738, such preclusion cannot occur when a "full and fair" state proceeding did not occur. This Court further stated that for this purpose, a state proceeding shall be determined to be "full and fair" if the minimum constitutional due process requirements of the Fourteenth Amendment are met. Thus, Petitioner's foregoing supposed unanswered issue has already been answered by this Court when it held in Kremer that the question of "full and fair" as a matter of law has been

determined to equal the question of whether minimum due process has been afforded. Therefore, certiorari need not be granted on the foregoing ground proffered by Petitioner.

III. No Conflict Exists Between the Circuits Over the Issues Herein.

On page 47 of his brief, Petitioner argues that there is a difference in opinion between the Ninth Circuit and other Circuits as to whether Sec. 1983 claims are "different" than state law claims and therefore not precluded under the doctrine of res judicata (claim preclusion). This argument is faulty because in the present case the Hawaii Court's final judgment was given collateral estoppel (issue preclusion) effect and not res judicata (claim preclusion) effect. 2/

In the present case, essential elements of Petitioner's Sec. 1983

substantive due process claim were the allegations: that Petitioner had a proprietary interest in his job via the covenant contained in Respondent HGEA, et.al's, collective bargaining agreement which provided that, among others, Petitioner could not be discharged from employment except for proper cause; [3] and that this covenant was breached.

The Hawaii Courts confirmed the arbitration award which held that the aforesaid clause in the collective bargaining agreement was not breached because Petitioner was discharged from employment with Respondent Kauai with proper cause. The District Court collaterally estopped Petitioner from relitigating in Federal Court the issue of whether the foregoing "proper cause" covenant was breached. The District Court also found that the allegation of breach of the foregoing covenant was the

"lynch pin" of Petitioner's Sec. 1983 claim and parts of the Sec. 1985(3) claim. This being the case, the District Court granted summary in favor of Respondents relying upon this Court's holding in Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986) that summary judgment is proper when it is established that an "essential element" of a party's claim does not exist, "since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."

The Ninth Circuit affirmed the District Court's foregoing application of collateral estoppel, 866 F.2d, at 1178-1179.

The foregoing indicates that assuming, arguendo, that there is a conflict between the Circuit Courts as to the application of res judicata, (claim

preclusion), this petition is not the proper case in which to resolve this conflict because res judicata (claim preclusion) was not involved in this case. Rather, only collateral estoppel (issue preclusion), was involved herein. Moreover, this Court in Allen held that collateral estoppel was applicable to a subsequent case that constituted a different claim all together. Therefore, it is of no consequence that the Hawaii Court judgment concerned a different claim than the Sec. 1983 claim.

Thus, Petitioner's arguments that there is a conflict in the Circuit Courts as to whether Sec. 1983 claims are subject to claim preclusion where there was no jurisdiction in the state proceeding to adjudicate a Sec. 1983 claim, etc., are irrelevant to the present case since collateral estoppel not res judicata is involved herein.

For the reasons stated above, certiorari should not be granted on this ground.

IV. Petitioner's "Put Right" Arguments For Certiorari Argue that Petitioner Is Entitled to an Appeal as of Right to the Supreme Court.

Petitioner on pages 47-48 of his brief argues that certiorari should be granted in order to "put right" the various alleged errors in the Ninth Circuit's decision herein. These "put right" arguments are, in substance, arguments that a writ of certiorari should be issued in order to afford Petitioner a routine right to appeal the decision of the Ninth Circuit rendered herein.

As established supra, this Court has stated both in its decisions and in its rules that writs of certiorari shall be sparingly issued only when there are special and important reasons therefor,

and will not be issued routinely as a matter of right. In view of this doctrine, Petitioner's "put right" arguments should be ignored by this Court since these "put right" arguments merely demand that this Court issue a writ of certiorari routinely as a matter of the Petitioner's right to appeal any decision of the Ninth Circuit, and no such right exists.

V. Petitioner Has Breached Supreme Court Rule 21.5., Warranting Denial of His Petition.

Supreme Court Rules (hereinafter, S.Ct.R.), Rule 21.5. states, in pertinent part, that:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

The present petition is not limited

to the alleged issues of first impression and the alleged conflict between the Circuits, which are the only legitimate points that should be raised in this petition. Rather, the present petition is a sixty-four page saga of the entire litigation herein, and asks this Court to overrule every perceived error made by the lower courts, important or not. Thus, Petitioner has failed to present with brevity, accuracy and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration herein.

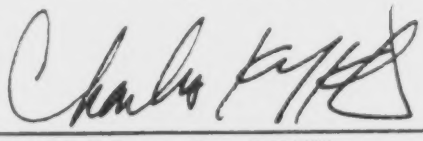
By reason of the foregoing, the present petition should be denied for breach of S.Ct.R., Rule 21.5.

CONCLUSION

For the foregoing reasons, Respondents HGEA, et al., submit that the

present petition for certiorari should be denied.

DATED: June 28, 1989.



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Association, AFSCME Local
152, AFL-CIO, et al.

FOOTNOTES

1/ Assuming, *arguendo*, that there was a legitimate novel question as to the constitutionality of the arbitration award confirmation procedure in the Hawaii Arbitration Act, Haw. Rev. Stat., Chapter 658 (hereinafter, Chapt. 658), there is no doubt that Chapt. 658 would withstand constitutional scrutiny inasmuch as Chapt. 658 adopted, virtually *verbatim*, the terms of the Federal Arbitration Act, 9 U.S.C., Section 1, et seq., and this Court has upheld judicial confirmation of arbitration awards under said Act's provisions, *see*, *Marine Trans. Corp. v. Dreyfus*, 284 U.S. 263, 275-276 (1932). Also, this Court has recently enforced said Act's provisions to compel the arbitration of claims that are actionable under Federal Statutes, *see*, *Shearson Am. Ex. Inc. v. McMahon*, 482 U.S. 220 (1987).

2/ *Res judicata* and collateral estoppel are often confused for each other. *Res judicata* precludes relitigation of any claim that was raised or could have been raised; Collateral estoppel only precludes relitigation of any issue of fact or law, *see*, *Allen v. McCurry*, 449 U.S. 90 (1980).

3/ While many collective bargaining agreements incorporate the "just cause" standard for discharge, the Respondent HGEA, et al., agreement utilizes the proper cause standard. The foregoing standards are equivalent, *see*, Elkouri, "How Arbitration Works" p. 612 (BNA 1973), and cases cited therein.

AFFIDAVIT OF FILING AND SERVICE BY MAIL

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

I, Charles K.Y. Khim, being first duly sworn, depose on oath and state that I am a member of the Bar of the Supreme Court of the United States; and that on the 28th day of June, 1989, a date within the time permitted, I mailed the original document attached hereto to the Clerk of the U.S. Supreme Court for filing, first class postage prepaid, and I served copies of the Brief in Opposition to Petition for Certiorari on the following persons at the following addresses by causing copies to be mailed in duly addressed envelopes, with first class postage prepaid as follows:

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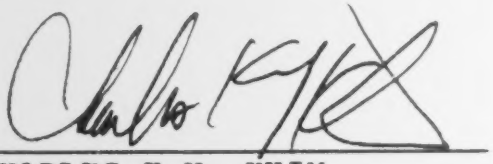

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et al.

F.S.

Subscribed and sworn to before me this
28th day of June, 1989.

Rena L. MacDonald

NOTARY PUBLIC, STATE OF HAWAII
My Commission Expires: 4-20-92

88-1989

Supreme Court, U.S.
FILED
JUL 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

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ON CERTIORARI TO THE
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FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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65 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the Ninth Circuit Court of Appeals erred in affirming the trial court's judgment granting Respondents County of Kauai *et al.*'s motion for summary judgment.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RONALD CALDEIRA, Petitioner

v.

COUNTY OF KAUAI;
HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,
AFSCME LOCAL 152, AFL-CIO,
et al., Respondents

ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Petitioner Ronald Caldeira (hereinafter "EMPLOYEE"), pursuant to Respondents Hawaii Government Employees Association AFSCME Local 152, AFL-CIO's (hereinafter "UNION"), collective bargaining agreement, challenged Respondent County of Kauai's (hereinafter

"EMPLOYER") three-day suspension and termination of his employment at an arbitration hearing. The hearing took two days, during which six witnesses testified, a reporter transcribed the proceedings, and the parties entered several photographs and over one hundred pages as exhibits. Petitioner's Appendix (hereinafter "APP.") C. Both sides then submitted post-hearing briefs (District Court Clerk's Record [hereinafter "CR"] at 60). The arbitrator's Award upheld the suspension and termination.

Instead of immediately seeking relief in the state court from the Arbitrator's Award, EMPLOYEE filed this 42 U.S.C. § 1983 action in the Federal District Court, alleging not only that EMPLOYER had dismissed him improperly, but also that UNION and EMPLOYER had conspired for many years and during the arbitration to effect

his termination. UNION moved for dismissal or summary judgment (CR 60) in which EMPLOYER joined. CR 59. As exhibits for or against the motion, the parties provided the trial court with several hundred documents from EMPLOYEE'S employment file (CR 69), the applicable collective bargaining agreement (CR 73, Ex.B of Ex.A.), the entire transcripts of the arbitration hearing (CR 67, Ex.A), UNION'S arbitration post-hearing brief (CR 60, Ex.A), the Arbitrator's Award (CR 60, Ex.1), affidavits of the Arbitrator and EMPLOYEE'S attorney during the arbitration (CR 60) and the state court judgment which confirmed the Arbitrator's award. CR 76, Ex. A.

EMPLOYEE then moved the state court to reconsider its confirmation judgment or to vacate, correct or modify the Arbitrator's Award, and provided with his motions "the

same evidentiary record as in federal court." Petition for Certiorari (hereinafter "Pet.") at p. 12. While these motions were pending in the state court, the federal trial court granted EMPLOYER and UNION'S motion for summary judgment, based in part on the preclusive effect of the confirmation judgment. EMPLOYEE moved the federal court for reconsideration, and provided with his supporting memorandum the entire record from the state court proceedings. He included the transcripts from the reconsideration/ vacate, etc. hearing which showed that the state court had denied those motions. CR80. The federal trial court denied EMPLOYEE'S motion for reconsideration and he appealed to the Ninth Circuit Court of Appeals, which affirmed the trial court.

SUMMARY OF ARGUMENT

This Court should deny the Petition for Certiorari because 28 U.S.C. § 1738 and this Court's decisions and interpretations of that statute required both the trial court and appellate court to conclude that the state court judgment confirming the arbitrator's award prevented EMPLOYEE from relitigating in federal court whether EMPLOYER discharged him for proper cause.

Even if the state judgment did not preclude EMPLOYEE from litigating his federal claims, his failure to provide sufficient facts to support his allegations warranted the imposition of summary judgment against him.

ARGUMENT

I. 28 U.S.C. §1738 REQUIRED BOTH THE TRIAL AND APPEAL COURTS TO CONCLUDE THAT THE STATE COURT JUDGMENT, WHICH CONFIRMED THE ARBITRATOR'S AWARD, PREVENTED EMPLOYEE FROM RELITIGATING IN FEDERAL COURT WHETHER EMPLOYER DISCHARGED HIM FOR PROPER CAUSE.

The federal full faith and credit statute,

28 U.S.C. § 1738, implements the full faith and credit clause of the United States Constitution. For purposes of this action, the pertinent portion of the statute reads:

> Such ... judicial proceedings [of any court of any State] ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ... from which they are taken.

In dealing with the applicability of § 1738 to an arbitrator's decision not judicially reviewed by a state court, this Court determined "that § 1738 obliges federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment." McDonald v. City of West Branch, 466 U.S. 284, 287, 104 S. Ct. 1799, 1802, 80 L. Ed. 302, 306 (1984). Accord, Migra v. Warren City School Bd. of Educ., 465 U.S. 75, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984) (§ 1738's preclusive effect of

state judgment to 42 U.S.C. § 1983 federal action to be determined under state law). This Court has ruled that even if a state court would give preclusive effect to one of its own state's judgments, federal preclusion would apply only where the party against whom the judgment is asserted had a "full and fair opportunity" to litigate his claim or issue in the state judicial proceedings. Allen v. McCurry, 449 U.S. 90, 95, 101 S. Ct. 411, 66 L. Ed. 2d 308, (1980). Also, the judgment must satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause. Kremer v. Chemical Construction Corp., 456 U.S. 461, 481, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).

It is EMPLOYER's position that EMPLOYEE had a full and fair opportunity to litigate the propriety of his dismissal, as the arbitration proceeding, and the the state

court confirmation and reconsideration hearings provided him with due process of law. EMPLOYER further contends that Hawaii state law precludes him from relitigating the propriety of his discharge in state court, and thus § 1738 precludes him from relitigating the issue in federal court.

A. Hawaii Preclusion Law Would Not Allow Caldeira To Challenge Whether EMPLOYER Had Proper Cause To Discharge Him.

In determining the effect of the confirmation and reconsideration proceedings upon subsequent actions in Hawaii state courts, two questions must be asked:

1) Did the proceeding result in a valid judgment?

2) If so, what is the preclusive effect of the judgment under Hawaii state law?

Under Hawaii Revised Statutes Section

658-12, once the Hawaii trial court granted the order which confirmed the arbitrator's award, and EMPLOYER filed the order with the clerk of the court, the order became a judgment. Pursuant to H.R.S. Section 658-14 the judgment had "the same force and effect in all respects as ... a judgment in an action." These statutes read thusly:

> § 658-12 Entry of Judgment
>
> Upon the granting of an order confirming, modifying, or correcting an award, the same shall be filed in the office of the clerk of the circuit court and this shall constitute the entry of judgment. An appeal may be taken from such judgment as hereinafter set forth.
>
> § 658-14 Effect of Judgment
>
> The judgment entered in accordance with Section 658-12 has the same force and effect in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered.

The latter statute clearly stated the Hawaii legislature's determination that the subject judgment, in and of itself, was legally valid. This validity remained attached to the judgment because it was never modified (Glover v. Fong, 42 Haw. 560, 574 (1958)) pursuant to the appeal provisions of H.R.S. Chapter 658, or other Hawaii statutes or rules of court.

Under Hawaii preclusion law, this judgment would bar EMPLOYEE from litigating any claim based upon an allegation of improper dismissal. In the state of Hawaii, it is well settled that:

> The judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim or defense which might have been properly litigated in the first action but were not litigated or decided.

Estate of Bernice P. Bishop, 36 Haw. 402,

416 (1943). See also, Silver v. Queen's Hospital, 63 Haw. 430, 629 P. 2d 1116 (1981); In re Estate of Ho Poi, 54 Haw. 35 (1972); Ellis v. Crockett, 51 Haw. 45, 451 P.2d 814 (1969); Glover v. Fong, 42 Haw. 560 (1958). Accord, Hall v. State, 7 Haw. App.___, 756 P. 2d 1048 (1988); Lundburg v. Stinson, 5 Haw. App. ____, 695 P. 2d. 328 (1985).

In Silver v. Queen's Hospital, 63 Haw. 430, 629 P. 2d. 1116 (1981), the Hawaii Supreme Court provided a three-part test to be used in order to apply res judicata or colatteral estoppel, an "aspect" of res judicata:

> [T]hree basic questions must ordinarily be answered in the affirmative: (1) Was the issue decided in the prior action identical with the issue presented in the present action? (2) Was there a final judgment on the merits in the prior action? (3) Was the party against whom the [preclusion] doctrine is asserted a party ... to the previous adjudication?

63 Haw. 436, 629 P. 2d 1121.

Upon application of these questions to the facts of the instant action, a Hawaii state court would not have allowed EMPLOYEE to pursue any action which depended on a finding that EMPLOYER improperly discharged him.

First, the arbitrator and the state court decided that EMPLOYEE'S discharge was proper. This was the identical issue at the heart of EMPLOYEE'S § 1983 cause of action in this case.

Further, it is apparent that the identical issue that the arbitrator and state court decided in EMPLOYER's favor was the issue upon which EMPLOYEE based his claim for relief in the instant action, i.e. EMPLOYER's supposed improper discharge of him. EMPLOYEE's prayer for relief in his complaint in the instant action clearly underscores this point. Therein he

requested not only the standard fees, costs, and just and proper further relief, but also "restoration of his job" and "general, special and punitive damages including but not limited to lost past, present, and future wages, back pay and front pay and compensation for injury to reputation for pain and suffering and mental distress ...." EMPLOYEE's basis for the relief he sought was, as the district court noted, the "linch-pin" of his § 1983 action, EMPLOYER's having improperly discharged him. In cases which contained far less indicia of identicality of issues than that of the instant action, the Hawaii Supreme Court repeatedly ruled preclusion to be applicable.

For example, Silver presented the converse of the situation in this action, in that a Hawaii trial court applied preclusion based on a federal trial court's judgment. The

plaintiff in Silver had instituted two state court suits against various hospitals and doctors for their denying him staff privileges at the hospitals. He based his actions on state antitrust statutes, and common law conspiracy. When he lost at trial on one of the suits, he appealed it to the Hawaii Supreme Court and, while the other state suit and his appeal were still pending, initiated a federal action naming the same defendants from his state law suits. In this federal suit he again alleged the defendants' conspiracy "and characterized his action as one 'involving a single ten-year state-wide conspiracy which continues to date and which violates the Sherman Act, the Clayton Act, and also the Civil Rights Act.'" 63 Haw. 434, 629 P. 2d 1119.

After the Hawaii Supreme Court decided the first suit in favor of the defendants

to that action, they successfully obtained summary judgment in the federal action on the basis of claim preclusion. The remaining federal defendants had by then obtained non-prejudicial dismissals of the original and first through third amended complaints in the federal suit. These defendants eventually succeeded in having the district court dismiss with prejudice the fourth amended complaint, and the plaintiff failed in his rehearing and certiorari petitions to the Ninth Circuit Court of Appeals and this Court, respectively.

Therefore, the defendants in the other state suit, the one that had been pending, moved for summary judgment based on the federal decision being a bar to the state suit. The trial court granted the motion and the Hawaii Supreme Court affirmed. In finding identicality of issues, the court

stated:

> At the heart of the plaintiff's complaint in all three cases was the alleged wrongful refusal of the defendant hospitals to grant him staff privileges. The basic charge in all of these cases was that the defendants had engaged in a long-term conspiracy to deprive him of these privileges and that in the process they had also violated the state antitrust statutes (in the state suits) and the federal antitrust and civil right acts (in the federal suit). The acts that were the subject of the state and federal claims were the same. The fact that the plaintiff sought relief under the civil rights act in his federal suit and alleged common law conspiracy and violation of Hawaii's antitrust laws in his state suits does not necessarily render his claims different causes of action for purposes of res judicata [sic]. [Citations] These cases essentially hold that alternate theories or claims arising from a single injury should be raised in a single action or they will be barred by res judicata. The single injury from which plaintiff suffered was, by his own allegation in the federal complaint, a single 10-year conspiracy involving, among others, all of the defendants in the instant suit. This was the same conspiracy to which the state suits were directed.

63 Haw. 437, 629 P. 2d 1122. See also, In re Estate of Ho Poi, 54 Haw. 35 (1972) (maternity determination for 17 children precluded some of children from litigating issue of "lawfully begotten children" in probate of father's will); Glover v. Fong, 42 Haw. 560 (1958) (prior determination in mandamus action that task which public officer had to perform was ministerial, precluded officer from litigating the issue in subsequent damages suit).

The Hawaii Appeals Court decided Lundburg v. Stinson, 5 Haw. App. 394, 695 P. 2d 328 (1985) in total conformity with the preclusive criteria of Silver. In Lundburg, various individuals, a trust and/or corporation (MLC) purportedly hired plaintiff to find a lessee-developer to develop property they owned and/or controlled. However, these defendants paid a comission to Stinson instead of plaintiff

when they entered into a lease with a corporation which plaintiff had initially contacted regarding the property. Plaintiff thus instituted an action against MLC (which by then had been dissolved) and Stinson for breach of contract, breach of promise and/or contractual interference. He then filed a second action against Stinson and the various individuals and a trust alleging, inter alia, that he was entitled to the comission "on the basis of quantum meruit or otherwise" and that Stinson had been unjustly enriched.

The trial court in the first action dismissed without objection his suit for failure to file a timely statement of readiness. The defendants in the second action were unsuccessful in moving for summary judgment based on the dismissal's preclusive effect, lost at trial, and appealed.

The Hawaii Court of Appeals applied the facts of the case to the requirements of Silver and reversed as to Stinson on the basis of res judicata. On the matter of identicality of issue, the court stated:

> Although the complaint against Stinson [in the first action] only raised contractual interference and breach of promise as grounds for relief, Lundburg is precluded from maintaining the present action against him for restitution or unjust enrichment since that claim could have been properly raised in [the first action]. Thus, questions (1) and (3) in Silver are answered in the affirmative.

5 Haw. App. 400, 695 P. 2d 333. See also, Hall v. State, 7 Haw. App. ___, 756 P. 2d 1048 (1988) (federal district court's dismissal of suit alleging law school's admission procedures and application thereof violative of over two dozen federal and state constitutional provisions and/or statutes, precluded litigation in state court of legality of the admission procedures or their application).

The courts' method of analyses in Silver and Lundburg, when applied to the instant action, clearly show that the judgment which confirmed the arbitrator's award decided an issue, i.e. whether EMPLOYER properly discharged EMPLOYEE, which was identical to that which supported and formed the basis for all of his federal claims. These claims alleged a conspiracy amongst EMPLOYER's past and present employees "so as to make out a case of good cause for [EMPLOYEE's] discharge," and UNION "knowingly joined in the conspiracy." Pet., at 3. The result of this conspiring, the loss of his job, purportedly denied EMPLOYEE liberty and property interests in violation of the Constitution of the United States of America. Id., p.4. It is thus evident that although EMPLOYEE now attempts to categorize his federal action as a challenge to the method used to secure his

discharge, he always was challenging the discharge itself. There is no legal distinction, for purposes of determining identicality of issues, (1) between the 10-year long conspiracy in Silver and the 5-year long conspiracies EMPLOYEE alleged herein and (2) between the results of the Silver and instant conspiracies, i.e. continued proper denial of hospital staff privileges in the former, and proper discharge in the latter. EMPLOYER is certain that if EMPLOYEE had brought his federal action in state court after the confirmation judgment was entered, such court, using the Silver criteria and method of analysis, would find that EMPLOYEE merely stated alternate theories or claims for relief which arose from the same acts and resultant injury as those of the arbitration and confirmation proceedings. Thus, the court would find identicality of

issues between the confirmation judgment and the federal claims.

Second, the confirmation judgment in this case was on the merits. In numerous Hawaii appellate court decisions upholding preclusion, parties have had less of an opportunity to litigate issues than EMPLOYEE had in state proceedings that now preclude his relitigation of his discharge. For example, in Lundburg, a dismissal for failure to file a statement of readiness was a judgment on the merits, and was given preclusive effect, even though the second action alleged different claims for relief. In Silver, a dismissal without leave to amend was treated likewise, irrespective that the first action alleged federal violations while the second action alleged state violations. Accord, Hall v. State.

Further, in both the Ho Poi and Glover cases, the Hawaii Supreme Court stated that even an erroneous final judgment was a judgment on the merits and would be given preclusive effect. See also, Matsushima v. Rego, 67 Haw. 556, 696 P. 2d 843 (1985) (a default judgment is a binding adjudication of all rights of the parties as contained in the complaint's facts and prayer for relief).

First, EMPLOYEE was a party in the arbitration and confirmation proceedings, and those facts thus meet the third requirement of Silver.

In this action, when EMPLOYER moved the state court to confirm the arbitrator's award, EMPLOYER provided the court with a copy of the award, while EMPLOYEE attached to his memorandum in opposition a copy of his federal complaint. CR 77, Ex.A of Ex.A. From the award, the court at the

very least was able to discern that EMPLOYEE had an opportunity to, and in fact did, challenge his discharge during the arbitration with ardency and imagination. EMPLOYEE had a two day hearing, calling six witnesses on his behalf, and entering several photographs as exhibits. EMPLOYEE also filed a post-hearing memorandum (CR 60, Ex.A) in which he argued that the discharge was not proper because he had not been insubordinate, his discipline amounted to disparate treatment, the orders he supposedly disobeyed were not lawful orders for his job position, and he had not received progressive discipline. However, the award also showed the court that EMPLOYEE was an incompetent worker for years; EMPLOYER repeatedly attempted to improve his performance; UNION represented EMPLOYEE every single time he <u>imagined</u> impropriety on the part of EMPLOYER; solely

due to UNION's efforts and requests, EMPLOYER often undertook actions merely to placate EMPLOYEE, although EMPLOYER had not believed that it was legally or contractually obligated to act; EMPLOYEE's continued substandard performance, not anything he still imagines anyone did, finally caught up with him; and not even his attorney from UNION or the arbitrator could undo the validity of EMPLOYER's final act--the dismissal--which he brought himself.

From the federal complaint the state court saw that every instance of wrongdoing on the part of EMPLOYER or UNION alleged therein, from "EPISODE 1" through the arbitration hearing, had been addressed in, by or through the arbitration hearing and process; and that each and every one of EMPLOYEE's federal claims sought to undo the arbitrator's well-founded decision that

EMPLOYER had proper cause to discharge EMPLOYEE.

Therefore, with both the award and the federal complaint before it, the state court entered a judgment that confirmed the award. The judgment therefore made final all of the arbitrator's findings of EMPLOYEE's incompetence, insubordination, irrational dislike of his co-employees and representatives from UNION, and self-inflicted discharge, and EMPLOYER's and UNION's legally-proper conduct from the time EMPLOYEE first worked for EMPLOYER through EMPLOYEE's discharge. Thus, the judgment was on the merits.

For elementary recapitulation of its preceding analyses and arguments, EMPLOYER states that under Hawaii law, the confirmation judgment would have precluded EMPLOYEE from litigating in a state court any action or claims, such as that which he

filed in this case, that depended on a determination that EMPLOYER improperly discharged him.

B. During The Arbitration Process, The Hearing To Confirm The Arbitrator's Award, And The Hearing To Reconsider The Confirmation Judgment, EMPLOYEE Had A Full And Fair Opportunity To, And Actually Did, Litigate The Propriety Of His Discharge.

As EMPLOYER discussed previously, this court has ruled that irrespective of whether a state court would give preclusive effect to one of its own state judgments, federal preclusion would apply in a subsequent § 1983 action to such a judgment only where the party against whom the judgment is asserted had a "full and fair opportunity" to litigate his claim or issue in the proceedings. Allen v. McCurry, 449 U.S. 90, 95, 101 S.Ct. 411, 66 L. Ed. 2d 308 (1980). Subsequent to the Allen decision, the Court has decided cases which, through the upholding of preclusion, clarified what proceedings afforded a full

and fair opportunity to litigate. These cases dealt with Title VII and § 1983 actions, and state court judgments where the claim or issue was actually or could have been litigated in the state judicial proceedings, and where a state court reviewed an administrative decision. It appears that the basic motivation behind the Court's decisions therein is a recognition that preclusion "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication. [Citation]." Id., at 94; University of Tennessee v. Elliot, 478 U.S. 788, 798, 106 S.Ct. 3220, 92 L. Ed. 2d 635 (1986).

EMPLOYER believes that the arbitration and state court proceedings in which EMPLOYEE ardently participated, provided him with a

full and fair opportunity to litigate his termination, in conformity with the Court's decisions. Further, the application of the confirmation judgment to preclude his instant action not only would comport with these decisions, but also would serve to prevent multiplicity of lawsuits, conserve judicial resources, and encourage reliance on adjudication.

In Allen, undercover police officers attempted to purchase heroin at a house which McCurry occupied, a gun battle ensued, and McCurry seriously wounded two of the officers. McCurry eventually surrendered, and officers entered the house without a warrant to search for other occupants. While inside, one of the officers seized drugs and other contraband that were in plain view as well as other contraband hidden in dresser drawers and tires on the porch.

McCurry was charged with assault with intent to kill and possession of heroin. He moved to suppress the evidence seized from the house, and the trial judge excluded the evidence seized in the tires and dresser drawers. McCurry was convicted of both offenses, and was unsuccessful in his appeal to the state's appellate court.

McCurry then filed a § 1983 claim for damages in federal district court against various defendants for conspiracy to violate and violation of, his Fourth Amendment rights. The District Court granted the defendants' motion for summary judgment, holding that collateral estoppel barred the plaintiff from relitigating the search and seizure issue already decided against him in the state court criminal action.

The Court of Appeals reversed ruling that since McCurry was barred from federal

habeas corpus relief, and a § 1983 cause of action was his only means of litigating his constitutional claim in a federal forum, collateral estoppel did not apply to bar his § 1983 claim.

In reversing the Court of Appeals, this Court stated that:

> [N]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 USC § 1738 [Footnote]. Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments.
>
> Moreover, the legislative history of § 1983 does not in any clear way suggest or restrict the traditional doctrines of preclusion.

449 U.S. at 97-98.

This Court went on to hold that collateral estoppel applied to the plaintiff's conspiracy and Fourth Amendment claims in his § 1983 suit, and he therefore could not relitigate the propriety of the search in

federal court. However, left unsaid by the Court, but inherent in its decision was a determination that a suppression hearing, a trial and an appeal afforded McCurry a full and fair opportunity to litigate his claims.

Kremer v. Chemical Construction Corp., 456 U.S. 461, 72 L. Ed. 2d 262, 102 S.Ct. 1883 (1982) involved the preclusive effect a state court review of an administrative decision would have on a subsequent Title VII federal action.

In Kremer, the respondent laid off then did not rehire the petitioner (Kremer). After an unsuccessful state administrative hearing and state court review thereon, Kremer brought a Title VII action in the federal district court on the basis of racially discriminatory discharge. The Federal District Court for the Southern District of New York dismissed the

complaint on the basis of res judicata and the United States Court of Appeals for the Second Circuit affirmed.

On certiorari, Kremer argued before this Court that administrative and judicial procedures, while adequate to preclude relitigation in state court, were inadequate to preclude relitigation of his Title VII claim in federal court. In affirming the Second Circuit, this Court noted that "[n]o single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause. [Citations]" Id., at 483.

The Court analyzed the state procedures and found that when Kremer filed his discrimination complaint with the state agency, the agency first investigated if there was probable cause to believe that the complaint was true. During the investigative process, he was given an

opportunity to present evidence, including exhibits and the testimony of witnesses, and the opportunity to rebut evidence presented by his former employer. He also had the right to counsel and the right to subpoena witnesses. Had the agency determined that probable cause existed, or if the investigation had not in fact allowed Kremer to present fully his contentions and evidence, then an appeal board would have been required to hold a public hearing on the merits of the complaint. Finally, Kremer had the right and did obtain judicial review of the agency's determination of no probable cause. This Court concluded that these procedures satisfied the Due Process Clause. Id., at 483-84.

This Court has also held that state law determines the preclusive effect of a state court judgment upon a subsequent § 1983

suit in federal district court even though the § 1983 claim was not litigated in the state court proceeding. Migra v. Warren City School Board of Education, 463 U.S. 75, 79 L. Ed. 2d 56, 104 S.Ct. 892 (1984).

Dr. Ethel Migra was the supervisor of elementary education in the Warren (Ohio) City School District whose employment contract the school board renewed. However, after she accepted, the school board re-voted and rescinded the renewal. She sued the board and its members in a state court for breach of contract and wrongful interference with her contract. She prevailed on the breach of contract cause of action, received a judgment for reinstatement and compensatory damages, and the Ohio appellate court affirmed.

Subsequently, she filed a complaint in federal district court pursuant to 42 U.S.C. §§ 1983 and 1985, claiming violation

of her rights under the First, Fifth and Fourteenth Amendments. The defendants moved for summary judgment, arguing that the complaint was barred by res judicata and the statute of limitations. The district court granted the defendants' motion for summary judgment and dismissed the complaint, and the United States Court of Appeals for the Sixth Circuit affirmed.

Upon granting certiorari, this Court discussed its prior decisions in Allen and Kremer and noted that the former "left open the possibility ... that the preclusive effect of a state-court judgment might be different as to a federal issue that a § 1983 litigant could have raised but did not raise in the earlier state-court proceeding." Id., at 83.

The petitioner argued for "this Court to interpret the interplay of § 1738 and § 1983 in such a way as to accord state-

court judgments preclusive effect in § 1983 suits only as to issues actually litigated in state court." Id. The petitioner argued that by denying state-court judgments claim preclusive effect, plaintiffs could still bring their federal claims to federal court and take advantage of the expertise of the federal forum. This Court noted that while "attractive from a plaintiff's perspective, it is not the system established by § 1983. That statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims." Id., at 84. The Court then rejected the argument and held "that petitioner's state-court judgment in this litigation has the same claim preclusive effect in federal court that the judgment would have in the Ohio state courts." Id.,

at 85.

While Migra dealt with claim preclusion, this Court, in deciding Migra, stated that "[i]t is difficult to see how the policy concerns underlying § 1983 would justify a distinction between the issue preclusive and claim preclusive effects of state-court judgments." Id., at 83. Therefore the rationale underlying the holding of Migra should apply to cases involving issue preclusion, such as the instant action.

EMPLOYEE had every opportunity to and did in fact litigate in the arbitration process, and state court confirmation and reconsideration proceedings, the "linch pin" of his § 1983 action, i.e., whether EMPLOYER had proper cause to discharge him. A review of those processes available to him and/or he actually used, show clearly that they afforded him all process due under the Fourteenth Amendment and this

Court's above-discussed decisions.

The arbitration process gave him the right to a hearing, to counsel, to obtain subpoenae, to present witnesses and documentary exhibits, to cross examine witnesses, to submit a post-hearing brief; to move a state court, or oppose a motion, to confirm, modify, correct or vacate the arbitrator's award; and to appeal to Hawaii's appellate courts any state court order vacating, or judgment entered upon, the award. During the actual arbitration proceedings EMPLOYEE did in fact have a two-day hearing, have counsel represent him, present witnesses and documentary exhibits, cross-examine EMPLOYER's witnesses, and submit a post-hearing brief.

When EMPLOYER moved the state court to confirm the award, EMPLOYEE filed a memorandum in opposition. The state court entered a judgment on the award based on

the arguments of counsel and the records of the action, which included inter alia, the arbitrator's findings that supported his decision that EMPLOYER discharged EMPLOYEE for proper cause. EMPLOYEE then moved the court for reconsideration, or to modify, correct or vacate the award, submitting therewith "the same evidentiary record as in federal court." The state court reviewed the transcripts of the arbitration hearing and all of EMPLOYEE's submittals, and found that the hearing had been "hotly contested" and the arbitrator had had "tremendous patience." App. G. at 21. The court therefore denied EMPLOYEE's motions.

EMPLOYEE mistakenly believed he could not take an appeal of the confirmation judgment, and instead filed a petition for mandamus in the Hawaii Supreme Court, which was denied. He then appealed the confirmation judgment, which the Hawaii

Supreme Court also denied, on the basis of untimeliness. While EMPLOYEE argues that this inability to take an appeal is another factor which shows he did not have a full and fair opportunity to litigate his claims during the state judicial proceedings (Pet. at 31-32), even a cursory reading of the arbitration provision and statute which supposedly prevented appeal, reveals the error in that argument.

The provision and statute read:

> Article 11, H. Step 4. Arbitration.
>
> * * * *
>
> The decision of the Arbitrator shall be final and binding upon the Union, its members, the Employees involved in the grievance, and the Employer. There shall be no appeal from the Arbitrator's decision by either party, if such decision is within the scope of the Arbitrator's authority as described below:
>
> 1. The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement.
>
> 2. His power shall be limited to deciding whether the Employer has violated any of the terms of this Agreement.

> 3. In any case of suspension or discharge where the Arbitrator finds such suspension or discharge was improper, the Arbitrator may set aside, reduce or modify the action taken by the employer. If the penalty is set aside, reduced or otherwise changed, the Arbitrator may award back pay to compensate the Employee, wholly or partially, for any wages lost because of the penalty. (Emphasis added)

> Hawaii Revised Statutes, § 658-15. Appeal when. Unless the agreement for award provides that no appeal may be taken an appeal may be taken from an order vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action, otherwise no appeal may be had. (Emphasis added)

As is evident, the contractual provision did in fact provide some grounds for appealing (to a state circuit court) the arbitrator's decision. On the other hand, the statute would enforce any agreement which restricted appeals of a court's "order vacating an award or ... a judgment entered upon an award." Through the contractual provision, it is clear that

EMPLOYER and UNION agreed not to appeal an arbitrator's decision to the circuit court unless certain grounds stated in the provision were present. However, the provision cannot be read in any manner which even intimates that there could be no appeal of the court's confirmation judgment. See Salud v. Financial Security Ins. Co. Ltd., 69 Haw. ____, 745 P. 2d 290 (1987) (order denying motion to vacate not appealable because not a judgment upon an order; upon denial, unsuccessful movant should confirm adverse award then take appeal of the judgment confirming award).

II. EVEN IF THE STATE JUDGMENT DID NOT PRECLUDE EMPLOYEE FROM MAINTAINING HIS 42 U.S.C. § 1983 ACTION, EMPLOYEE NEVERTHELESS FAILED TO PROVIDE FACTS OF SUFFICIENT SPECIFICITY TO WITHSTAND SUMMARY JUDGMENT.

Were this Court to hold that the state confirmation judgment prevented EMPLOYEE from relitigating that his discharge was

proper, and hence self-inflicted, then he would not be able to maintain this entire federal action, to include both his § 1983 and 1985(3) claims. See, Casseratti v. Nevada County, 824 F. 2d 735 (9th Cir. 1987) (without § 1983 deprivation of rights, § 1985 conspiracy claim based on same facts not actionable); Villanueva v. McInnis, 723 F. 2d 414 (5th Cir. 1984) (conspiracy to commit murder not actionable where no constitutional deprivation). However, even if the Court were to rule that the judgment had no preclusive effect, the application of the facts of this action to this Court's summary judgment decisions, show that the granting of summary judgment was proper.

> [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As Adickes [v. S.H.Kress & Co., 398 U.S. 144 (1970)], supra, and [First National Bank of Arizona v.] Cities

Service [Co., 391 U.S. 253 (1968)] supra indicate, there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Cities Service, 391 U.S. at 288-389. If the evidence is colorable, Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam), or is not significantly probative, Cities Service, supra, at 290, summary judgment may be granted.

* * * *

[W]e are convinced that the inquiry involved in ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L. Ed. 2d 202

(1986).

In Liberty Lobby, the Court had to decide the parameters for the granting of summary judgment in a libel action, given the clear and convincing burden of proof it had established in New York times Co. v. Sullivan, 376 U.S. 255 (1964). The Court of Appeals, D.C. Circuit, in not granting summary judgment on 9 of 30 allegedly defamatory statements, had ruled that "[t]o defeat summary judgment the respondents did not have to show that a jury could find actual malice with 'convincing clarity.'" 477 U.S. at 247. As the first-provided quote shows, the Supreme Court ruled otherwise, recognizing that a judge could grant summary judgment if the facts were such that a fair-minded jury would not find for the plaintiff.

Particularly relevant to the instant case was the Court's disposition of the

respondents' argument, based on Poller v. Columbia Broadcasting Co., 368 U.S. 464 (1962), that summary judgment should seldom, if ever, be granted where the state of mind (in Liberty Lobby, malice) was at issue. The Court disagreed, based on its finding that Poller had not held that a plaintiff did not have to offer any concrete evidence from which a reasonable juror could return a verdict in his favor in order to defeat a properly supported summary judgment motion. Further, the Court decided that Rule 56 (e), Cities Services and Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), mandated the direct opposite, "that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering 'any significant probative evidence tending to support the complaint'". 477 U.S. at

253. See also, Eisenberg v. Ins. Co. of North America, 815 F. 2d 1285, 1289 (9th Cir. 1987); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assn., 809 F. 2d 626 (9th Cir. 1987).

Other decisions of this Court are important in order to show the applicability of the Liberty Lobby holdings to the instant action. First, in Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L. Ed. 2d 471 (1977), this Court held that in order for the plaintiff, who the defendant Board failed to rehire, to have been able to maintain his § 1983 action based on a First Amendment free speech violation, he had to have shown that his exercise of his constitutionally-protected right was a "substantial factor" in causing his injury. Further, on remand, this Court directed the trial court "to determine whether the Board

[could show] by a preponderance of the evidence that it would have reached the same decision as to [plaintiff's] re-employment even in the absence of the protected conduct." Accord, Elwood v. Pina, 815 F. 2d 173 (1st Cir. 1987) (jury instructions proper which required the defendant to prove by preponderance of the evidence that there was valid reason for discharge, or the jury to expressly find that plaintiffs would not have been fired but for their exercise of political activity).

Finally, the Court has held that the intent and language of § 1985(3) restrict the statute's application to conspiracies which "aim at a deprivation of the equal enjoyment of rights secured by law." Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L. Ed. 2d 338 (1971). United Brotherhood of Carpenters and

Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 835, 103 S.Ct. 3352, 77 L. Ed. 2d 1049 (1983). Further, the conspiracy must be motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id., 463 U.S. at 829.

All of the preceding, combined with the entire record of the instant case, show that the granting of summary judgment in favor of UNION and EMPLOYER was and is proper. At the trial court level, EMPLOYER and UNION provided a wholly adequate showing that EMPLOYEE caused his own discharge through his insubordination and substandard performance (CR 60, Ex. 1; CR 76, Ex. A), and that they had never conspired to effect his dismissal. CR 60, Ex. A, and Affidavits of Khim and Ling; CR 67, Ex. A. Further, at least from

EMPLOYER's perspective, EMPLOYEE's several hundred page submission of documentary evidence (CR 69) gave the trial court and now gives this Court even more of a reason to grant summary judgment on the basis that no fair-minded jury could return a verdict that EMPLOYER did not have proper cause to discharge EMPLOYEE.

The submission shows that EMPLOYEE was incompetent in performing his employment obligations; he created, only in his mind, instances of gross misconduct by EMPLOYER and UNION; and nothing except complete acquiescence to all of his demands would have shown him that EMPLOYER and UNION were not trying to "get him." CR 69, passim. While EMPLOYEE might have hoped and does hope that some place in the record there may be some sort of indications of wrongdoing by EMPLOYER and UNION which caused his discharge, his hope had and has

no factual basis. No one, and especially a reasonable juror, could review the record and arrive at the same perception as EMPLOYEE, much less return a verdict in his favor. The legal, proximate cause of his discharge was his insubordinate behavior and poor work performance. Even if EMPLOYER and UNION had conspired to effect his discharge, his own actions and inactions provided more than adequate justification for EMPLOYER to discharge him.

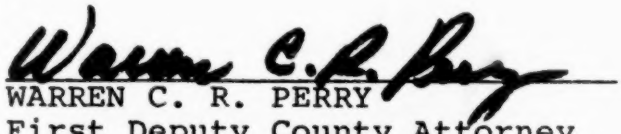
Further, nowhere in his pleadings, his submissions or other portions of the trial Court's record appears any intimation that the supposed conspiracy which led to his discharge was based on "some racial, or perhaps class-based, invidiously discriminatory animus." Thus, based on Liberty Lobby and Griffin, summary judgment in favor of EMPLOYER and UNION was and is

proper relative to his § 1985 claims.

CONCLUSION

Based upon the foregoing arguments, Respondents County of Kauai, et al. respectfully request that this Court deny the Petition for Certiorari, and award to Respondents its costs and fees incurred in defending against this action.

DATED: Lihue, Hawaii, July 5, 1989.



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NOTARIZED STATEMENT OF FILING BY MAIL

AND

CERTIFICATE OF SERVICE BY MAIL

STATE OF HAWAII)
) SS.
COUNTY OF KAUAI)

I, Warren C. R. Perry, being first duly sworn, depose on oath and state that I am a member of the Bar of the Supreme Court of the United States; and that on the 5th day of July, 1989, a date within the time permitted, I mailed the original document attached hereto to the Clerk of the United States Supreme Court for filing, first class postage prepaid, and I served copies of the Notice of Appearance of Counsel on the following persons at the following addresses by causing copies to be mailed in duly addressed envelopes, with first class postage prepaid as follows:

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Subscribed and sworn to before me this
5th day of July, 1989.

Vs. Quien L. Tanga

NOTARY PUBLIC, STATE OF HAWAII
My Commission Expires: 6-21-92

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RONALD CALDEIRA, Petitioner

v.

COUNTY OF KAUAI;
HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,
AFSCME LOCAL 152, AFL-CIO,
et al., Respondents

ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENTRY OF APPEARANCE OF COUNSEL

Comes now Warren C. R. Perry and on behalf of Respondents County of Kauai, et al., herewith enters his appearance, for the purpose of responding to a petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, for review of the Ninth Circuit's decision and opinion in Caldeira v. County of Kauai, et al., 866

F.2d 1175 (9th Cir. 1989, Docket No. 87-2959).

DATED: Lihue, Hawaii, July 5, 1989.

Respectfully submitted,

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